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CIS

FEDERAL ANTITRUST POLICY: IMPLICATIONS FOR SMALL BUSINESS

HEARING

BEFORE THE

COMMITTEE ON SMALL BUSINESS
UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

FEDERAL ANTITRUST POLICY:
IMPLICATIONS FOR SMALL BUSINESS

DECEMBER 1, 1981

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CONTENTS

Page

Statement of Senators:
  Chiles, Hon. Lawton, a U.S. Senator from the State of Florida 13
  Gorton, Hon. Slade, a U.S. Senator from the State of Washington, and chairman, Subcommittee on Productivity and Competition of the Committee on Small Business 1
  Nickles, Hon. Don, a U.S. Senator from the State of Oklahoma 9
  Nunn, Hon. Sam, a U.S. Senator from the State of Georgia 8
  Sasser, Hon. James R., a U.S. Senator from the State of Tennessee 18
  Weicker, Hon. Lowell Jr., a U.S. Senator from the State of Connecticut, and chairman, Committee on Small Business 10
Statement of:
  Baxter, William F., Assistant Attorney General, Antitrust Division, U.S. Department of Justice 101
  Dennis, William J., Jr., director of research, National Federation of Independent Business 260
  Friedlander, Philip P., Jr., vice chairman, Small Business Legislative Council 256
  Miller, Dr. James C. III, Chairman, Federal Trade Commission, accompanied by Jack Carley, General Counsel; Dr. Thomas Campbell, Director, Bureau of Competition; and Dr. Robert Tollison, Director, Bureau of Economics 22
  North, William D., general counsel, National Association of Realtors 261

HEARING DATE

December 1, 1981:
  Morning session 1

FEDERAL ANTITRUST POLICY: IMPLICATIONS FOR SMALL BUSINESS

TUESDAY, DECEMBER 1, 1981

U.S. SENATE,
COMMITTEE ON SMALL BUSINESS,
SUBCOMMITTEE ON PRODUCTIVITY AND COMPETITION,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:35 a.m., in room 424, Russell Senate Office Building, Hon. Slade Gorton (chairman of the subcommittee) presiding.

Present: Senators Gorton, Weicker, Nickles, Rudman, Nunn, Bumpers, and Sasser.

Also present: Robert J. Dotchin, staff director; R. Michael Haynes, chief counsel; Brian F. Hartman, financial analyst; Margaret M. Broadbin, hearing clerk; Alan L. Chvotkin, chief counsel, minority; G. Thomas Cator, economist, minority; from the office of Senator Gorton, Dr. Robert Thomas, William H. Clarke, and Charles G. Nordhoff.

STATEMENT OF HON. SLADE GORTON, A U.S. SENATOR FROM THE STATE OF WASHINGTON, AND CHAIRMAN, SUBCOMMITTEE ON PRODUCTIVITY AND COMPETITION OF THE COMMITTEE ON SMALL BUSINESS

Senator GORTON. I will call to order this meeting of the Subcommittee on Productivity and Competition of the Senate Committee on Small Business, as we have both a crowded and an important agenda today.

This morning's hearing is another step in a continuing process involving the Congress and this administration's enforcement of the Nation's antitrust laws. This process began when spokesmen of the administration made broad statements about the philosophies of antitrust enforcement which alarmed many of us in the Congress.

These statements indicated that those charged with Federal antitrust enforcement disagree with some of the laws on the books, or with a clear line of Supreme Court precedents interpreting them. We were upset by the implication that those administration officials apparently did not intend to ask the Congress to change laws with which they disagreed but rather would attempt unilaterally to mold the laws to fit their philosophy through a policy of selective enforcement.

The reaction of the Congress has been swift and strong. There is widespread bipartisan agreement that a highly competitive, free market economy can be guaranteed only by vigorous enforcement of all of the antitrust laws. Such an economy is, of course, an essential element in the administration's program to restore this country's economic health.

This is especially true at a time at which we are engaged in a major effort to rid the country of unnecessary and burdensome Government regulation. Changes in the antitrust statutes must be made only directly—by action of the Congress.

At the same time, reasonable people certainly differ over antitrust theory, and each administration must shape its own priorities for enforcement. Close consultation between the Congress and the administration is crucial. I am encouraged that this process has already begun. The appearance of Mr. Baxter and Mr. Miller here this morning reaffirms the strong commitment which each of them made previously to work closely with the Congress on these questions. I am confident that this hearing will provide another constructive step in that process.

In another sense, this morning's hearing is unique. For the first time this session in the Senate, the focus will be particularly upon the effects of antitrust law enforcement policies on small businesses. The small business community is deeply concerned. The statement of Mr. Jerome Gulan from the National Small Business Association in the July 8, 1981, Wall Street Journal, to the effect that the administration's approach in this area "scares the pants off us" is the most dramatic public comment. However, all of the members of this committee have received numerous similar expressions of concern from small businesses.

We are told there is apprehension in small business circles for the following reasons:

One, we are experiencing what some experts consider to be a recordbreaking merger wave, which may be fueled in part by signals reportedly sent by the administration and received on Wall Street that some types of mergers which would have been prohibited in the past are now worth a try.

Two, the Robinson-Patman Act, which is designed particularly to protect small businesses against price discrimination, has been labeled by administration spokesmen as "a dreadful piece of legislation," full of "absurdities" and an "unjustified protection for small business."

Three, the administration seems to dismiss resale price maintenance as being rarely cause for antitrust concern, despite the fact that such conduct clearly and undisputedly violates existing law, and without the slightest hint of recognition by the administration of the fact that such conduct often severely restricts the freedom of small businesses to respond individually to the competitive conditions which they face in their markets.

Four, suggestions have been made that the administration may abandon enforcement in the area of predatory pricing, apparently because of doubts that it really occurs. Members of the small business community are painfully aware that it does in fact occur, almost always with the result that small firms are driven out of business.

I am certain that specific questions on all of these points and more will be raised during the course of this hearing. There is also, however, a basic question which underlies this entire proceeding: In passing the various antitrust laws, the Congress was not motivated by economic considerations alone. Throughout the history of these statutes, it has been clear that one of their purposes, and I quote, "* * * was to perpetuate and preserve for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other"—from Learned Hand.

This historic congressional purpose is unquestionably reflected in the legislative history and Supreme Court interpretations of the Sherman Act, the Clayton Act, and the Robinson-Patman Act, and it still makes a great deal of sense today, in this time of preoccupation with economic recovery. Small companies are the primary generators of new jobs and thus must be a principal factor in the solution to our unemployment problems.

Dollar for dollar, small businesses are more innovative than large enterprises. They also tend to be especially responsive to the needs of the surrounding communities. Finally, the democratic principles of decentralization of economic and political power which moved Senator Sherman in 1890 and Congressman Celler and Senator Kefauver in 1950, are being viewed today with a renewed sense of importance.

Public statements attributed to Mr. Baxter and Mr. Miller cast doubt upon whether the administration recognizes this congressional purpose underlying the antitrust laws. We recognize that the Antitrust Division or the Federal Trade Commission can act only if prescribed circumstances are found to exist, such as certain activity which may substantially lessen competition or tend toward a monopoly, a conspiracy in restraint of trade, an attempt to monopolize, or the like. We are concerned, however, that the administration intends to pursue such a narrow economic approach to these questions, departing so far from the traditional view which is still generally accepted by the courts, that the opportunity will be lost to use these laws in instances where they can apply as an important instrument to advance this clearly established underlying congressional policy.

On behalf of this committee, I should like to extend this morning a special welcome to Senator Chiles, to Mr. Baxter, and to Mr. Miller, and to the witnesses representing the small business community. We all appreciate this opportunity mutually to communicate and to clarify our positions on these important questions.

Since we have already read the written statements of the principal witnesses, other than the Senator, I would ask that in your oral testimony you simply summarize your statements, highlighting the important points. Please, however, comment on this basic question: Do you recognize the congressional intent to preserve local control of business and to protect small business as a relevant consideration in setting antitrust enforcement policies? If so, how is this recognition reflected in your policies and priorities?

Thank you.

[The prepared statement of Senator Gorton follows:]

THE HONORABLE SLADE GORTON
CHAIRMAN, PRODUCTIVITY AND COMPETITION SUBCOMMITTEE
SENATE COMMITTEE ON SMALL BUSINESS
DECEMBER 1, 1981

This morning's hearing is another step in a continuing process involving the Congress and this Administration's enforcement of the Nation's antitrust laws. This process began when spokesmen of the Administration made broad statements about their philosophies of antitrust enforcement which alarmed many of us in the Congress. These statements indicated that those charged with federal antitrust enforcement disagree with some of the laws on the books, or with a clear line of Supreme Court precedents interpreting them. We were upset by the implication that those Administration officials apparently did not intend to ask the Congress to change laws with which they disagreed, but rather would attempt unilaterally to mold the laws to fit their philosophy through a policy of selective enforcement.

The reaction of the Congress has been swift and strong. There is widespread bipartisan agreement that a highly competitive, free market economy can be guaranteed only by vigorous enforcement of all of the antitrust laws. Such an economy is, of course, an essential element in the Administration's program to restore this country's economic health. This is especially true at a time at which we are engaged in a major effort to rid the country of unnecessary and burdensome government regulation. Changes in the antitrust statutes must be made only directly--by action of the Congress.

At the same time, reasonable people certainly differ over antitrust theory, and each Administration must shape its own priorities for enforcement. Close consultation between the Congress and the Administration is crucial. I am encouraged that this process has already begun. The appearance of Mr. Baxter and Dr. Miller here this morning reaffirms the strong commitment which each of them made previously to work closely with the Congress on these questions. I am confident that this hearing will provide another constructive step in this process.

In another sense, this morning's hearing is unique. For the first time this session in the Senate, the focus will be particularly upon the effect of antitrust enforcement policies on small businesses. And, the small business community is deeply concerned. The statement of Mr. Jerome Gulan from the National Small Business Association in the July 8, 1981 WALL STREET JOURNAL to the effect that the Administration's approach in this area "scares the pants off us" is the most dramatic public comment, but all of the Members of this Committee have received numerous similar expressions of concern from small businesses. We are told there is apprehension in small business circles for the following reasons:

> --we are experiencing what some experts consider a record-breaking merger wave, which may be fueled in part by signals reportedly sent by the Administration and received on Wall Street that some types of mergers which would have been prohibited in the past are now worth a try;

--the Robinson-Patman Act, which is designed particularly to protect small businesses against price discrimination, has been labeled by Administration spokesmen as a "dreadful piece of legislation" (Dunn's Review, August 1981), full of "absurdities" (American Lawyer, July 1981) and an "unjustified protection for small business" (N.Y. Times, April 26, 1981);

--the Administration seems to dismiss resale price maintenance as being rarely cause for antitrust concern, despite the fact that such conduct clearly and undisputedly violates existing law, and without the slightest hint of recognition by the Administration of the fact that such conduct often severely restricts the freedom of small businesses to respond individually to the competitive conditions they face in their market;

--suggestions have been made that the Administration may abandon enforcement in the area of predatory pricing, apparently because of doubts that it really occurs. Members of the small business community are painfully aware that it does in fact occur, almost always with the result that small firms are driven out of business.

I am certain that specific questions on all of these points, and more, will be raised during the course of this hearing. There is also, however, a basic question that underlies this entire proceeding. In passing the various antitrust laws, Congress was not motivated by economic considerations alone. Throughout the history of these statutes, it has been clear that one of their purposes "...was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other." (Hand, J., U.S. vs. Aluminum Co. of America, 148F.2d416,429.) This historic Congressional purpose is unquestionably reflected in the legislative history and Supreme Court interpretations of the Sherman Act, Clayton Act, and the Robinson-Patman Act. And, it still makes a great deal of sense today--in this time of preoccupation with economic recovery. Small companies are the primary generators of new jobs, and thus must be a principal factor in the solution to our unemployment problems. Dollar for dollar, small businesses are more innovative than large enterprises. They also tend to be especially responsive to the needs of the surrounding communities. Finally, the democratic principles of decentralization of economic and political power, which moved Senator Sherman in 1890 and Senators Celler and Kefauver in 1950, are being viewed today with a renewed sense of importance.

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such as certain activity which may substantially lessen competition or tend towards a monopoly, a conspiracy in restraint of trade, an attempt to monopolize, or the like. We are concerned, however, that the Administration intends to pursue such a narrow economic approach to these questions, departing so far from the traditional view which is still generally accepted in the courts, that the opportunity will be lost to use these laws, in instances where they can apply, as an important instrument to advance this clearly established underlying Congressional policy.

On behalf of this Committee, I should like to extend this morning a special welcome to Mr. Baxter and Dr. Miller, and to the witnesses representing the small business community. We all appreciate this opportunity mutually to communicate and to clarify our positions on these important questions. Since we have already read your written statements, I would ask that in your oral testimony, you simply summarize your statements highlighting the important points. Please, however, comment on this basic question: Do you recognize the Congressional intent to preserve local control of business and to protect small business as a relevant consideration in setting your antitrust enforcement policies? If so, how is this recognition reflected in your policies and priorities?

Thank you.

Senator **Gorton**. We now have Senator Nunn with us, and we would be happy if you would make an opening statement.

STATEMENT OF HON. SAM NUNN, A U.S. SENATOR FROM THE STATE OF GEORGIA

Senator **Nunn**. Thank you, Mr. Chairman.

Mr. Chairman, I want to compliment you for requesting these hearings in this Small Business Committee, and I also want to compliment you for your leadership in chairing today's session on the impact of the Reagan administration's antitrust policy on small business. In my view, these hearings are timely and they are very important, so I thank you for your leadership in this area. I certainly join you in believing that these hearings will be meaningful and will at least give us a great deal of information, hopefully that we do not have now.

The antitrust statutes are extremely complex. The case law compounds that complexity for both Federal and State antitrust enforcement agencies and for the business community. Nevertheless, small business relies heavily on the vigorous enforcement of these antitrust laws.

For them, the antitrust laws have two important purposes: A positive side of preserving opportunities for market entry and competition, and a negative side of proscribing behavior which restricts that competition. With the general instability in the Nation's economy, high interest rates, inventories up, sales down, and small business bankruptcies increasing, enforcement of the antitrust laws becomes even more important to small business in preserving an environment of free and fair competition.

In my view, these laws have a societal benefit, particularly for small business, that goes far beyond economic efficiency arguments. Unfortunately, there has been some confusion about this administration's antitrust policy generally and little if anything said about their small business program specifically. I hope these hearings will be informational on these points and not confrontational.

This committee and the small business community need to clarify where this administration will direct its antitrust enforcement efforts and what impact such actions will have on the small business sector and on our Nation's economy.

Mr. Chairman, I appreciate the courtesy.

Senator **Gorton**. Thank you, Senator Nunn.

Senator Nickles.

STATEMENT OF HON. DON NICKLES, A U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator **Nickles**. Thank you, Mr. Chairman.

I, too, would like to compliment you for your attentiveness in this area. I see that you have an outstanding group of witnesses today. I look forward to having some input from their expertise, and also to shedding some light on where they are coming from.

My interest in this area, as I have discussed with you previously, is primarily that of free enterprise. I do not know that we need so much to segregate small business, but we do need to make sure that all business has possible entrance and access to markets and the marketplace. I think that is really the purpose of this hearing today and the purpose of the antitrust laws.

Therefore, hopefully we will find that those laws are not being abused, and hopefully we will find that they can be administered in a way or changed in a way to insure small business the opportunity to compete. I think that is really one of the major criteria of success for our country, competitiveness. I think the encouragement and also the accessibility are important, not necessarily by laws granting undue favor or privilege to small business but by allowing small business accessibility in being able to compete in a lot of areas that possibly have been foreclosed in the past.

Again, I wish to thank you and I look forward to hearing from our distinguished panelists today.

Senator **Nunn**. Mr. Chairman, just one other brief word. Senator Chiles is our first witness, and I know that one of the things he will probably be talking about is the effect of some of the mergers

taking place on overall credit availability and the effect this has on competition.

I am interested in hearing from him because I know he has looked into this subject. That is a timely subject. Everywhere I go in my State people are asking me how, as they read it in the media, $30, $35, and $40 billion in credit can be available for merger purposes for large corporations, and yet when they go to the bank they either cannot get a loan or they have to pay interest rates that they cannot afford.

Therefore, I consider this an important overall element of antitrust that has not faced this Nation in this degree and in this proportion before. It is not covered by any laws; it is covered more by economic policy and actions of the Federal Reserve Board. It is a new element that I hope we will be able to get into at these hearings.

Senator **Gorton**. Senator, I get exactly the same questions in my State and have exactly those concerns, and we do want to hear from Senator Chiles on that subject and anything else about which he speaks.

We now have the chairman of the full committee with us, however, and I am delighted that he has permitted us to hold this hearing.

Senator, do you have any opening statement?

STATEMENT OF HON. LOWELL WEICKER, JR., A U.S. SENATOR FROM THE STATE OF CONNECTICUT, AND CHAIRMAN, COMMITTEE ON SMALL BUSINESS

Senator **Weicker**. I will submit my opening statement for the record.

Needless to say, the subject matter of this hearing is exactly why there is a Small Business Committee. Now, we will let you and the committee do what you are supposed to be doing, which is, obviously, to focus on what is a problem for the country and the small business community.

Senator **Gorton**. Thank you.

[The prepared statement of Senator Weicker follows:]

OPENING STATEMENT OF
SENATOR LOWELL WEICKER, JR.
DECEMBER 1, 1981

SENATOR GORTON, AS CHAIRMAN OF THE SMALL BUSINESS COMMITTEE, I FIRST WANT TO COMMEND YOU FOR YOUR LEADERSHIP ROLE IN CALLING FOR AND PUTTING TOGETHER THIS HEARING. ANTITRUST LAWS AND THE WAY THEY ARE ENFORCED BY THIS ADMINISTRATION ARE OF MAJOR IMPORTANCE TO SMALL BUSINESSES IN THIS COUNTRY. CONGRESS MUST ENSURE THAT ALL BUSINESSES HAVE THE OPPORTUNITY TO PARTICIPATE FAIRLY AND WITHOUT UNREASONABLE OR ILLEGAL RESTRAINTS IN THE FREE MARKETPLACE. SMALLER BUSINESSES IN PARTICULAR, ARE UNFORTUNATELY MOST SUSCEPTIBLE TO THESE ILLEGAL ACTIVITIES.

IT IS EQUALLY IMPORTANT TO SMALL BUSINESS THAT A COMPETITIVE ECONOMIC SYSTEM BE MAINTAINED.

TODAY, WE ARE WITNESSING A GROWING CONCENTRATION OF ECONOMIC POWER IN FEWER HANDS. THE TOP 100 FORTUNE FIRMS CONTROL THE SAME SHARE OF MANUFACTURING ASSETS THAT THE TOP 200 DID 30 YEARS AGO. PUT SIMPLY, THIS MEANS THAT TODAY THE SAME AMOUNT OF THE NATION'S ASSETS ARE CONCENTRATED IN HALF AS MANY HANDS. THE TOP 200 FIRMS NOW CONTROL 61 PERCENT OF THE NATION'S MANUFACTURING AND MINING ASSETS, WHICH IS THE SAME PERCENTAGE SHARE OWNED BY THE TOP 1000 ENTERPRISES AT THE START OF WORLD WAR II. MEANWHILE, SMALL AND MEDIUM BUSINESSES TODAY CONTROL LESS THAN 27 PERCENT OF THIS COUNTRY'S CORPORATE ASSETS, WHEREAS THEY OWNED NEARLY TWICE AS MUCH IN 1960.

If the current merger wave continues, the free enterprise system as we know it today will be in serious jeopardy. Instead our economic system will be characterized by a lack luster, non-innovative, non-competitive business community where the few control the many.

The Federal agencies charged with the responsibility for the antitrust laws - the Department of Justice and the FTC - must begin to aggressively enforce existing laws. We have heard from Administration officials that "economic efficiency" is what counts. We are also told that the Department of Justice and the FTC really are not very interested in prosecuting certain types of antitrust violations that may occur. Well let me tell you, I for one find this very disturbing!

Perhaps the existing antitrust laws are not perfect and perhaps there is important new thinking evolving in this area. That is not the point! The point is that the existing antitrust laws are to be enforced until such time as Congress changes them through the proper legislative process -- not by Administrative fiat.

As Chairman of the Small Business Committee, and as Chairman of the Appropriation Subcommittee that appropriates money for both the FTC and the Department of Justice, I intend to do what I can to see that the interests of small business are not forgotten in the policy making process of these two agencies. I look forward to hearing the testimony of our witnesses today.

Senator **Gorton**. Senator Chiles, we welcome you.

STATEMENT OF HON. LAWTON CHILES, A U.S. SENATOR FROM THE STATE OF FLORIDA

Senator **Chiles**. Mr. Chairman, I am delighted to be here.

Senator Weicker, I think, made the statement that I was just going to open up with. I think the Senate Small Business Committee has long had a reputation of speaking out very loudly and very strongly for small business. That has always been a bipartisan voice, and I was most pleased with your opening statement, Senator Gorton, to hear the way you laid out the problem and the concern that I think small business legitimately has at the signals that have come from the new administration and the results from those signals. I think that is a very, very legitimate concern that they have, especially in the current situation.

I am delighted to have the opportunity to briefly present my views. I would submit my statement and try to just briefly summarize it for you.

Senator **Gorton**. Thank you. Your entire statement will be included in the record, Senator.

Senator **Chiles**. I find so many people, small businessmen, that are concerned with the number of mergers and acquisitions and the effect that that is having on small business. Certainly we know how important small business is to America, that it accounts for the vast majority of jobs and innovations, and keeping a small business environment healthy keeps the economy of the United States healthy. I certainly know why the subcommittee has such a strong interest in that.

When we look at the mergers and acquisitions, we see that in 1975 there were 900 transactions; that was $11.8 billion. In 1976, there were 1,080 transactions concerning some $20 billion. If you go up to 1978, there were 1,350 transactions, $34 billion. Therefore, we see the size of the transactions is increasing. Between 1975 and 1979, 120 deals exceeded $100 million; 40 exceeded $300 million, and 5 exceeded $1 billion.

However, if you just look at 1981 figures then you see a tremendous jump with the first three quarters of 1981, 1,807 transactions with a value of $60.8 billion. The number of transactions is 33 percent higher than last year and the value is 100 percent higher than the same time last year. So far in 1981 we have five transactions that have exceeded $1 billion, with the Du Pont takeover of Conoco exceeding $8 billion.

Therefore, we see there is just a tremendously increasing number of mergers. They are larger in individual size, and many, many small companies are being swallowed up. The merger activity negatively affects small businesses, and especially their ability to compete, the amount of credit lost to those mergers.

We know that it is a national policy, as evidenced by the Federal Reserve System, as evidenced by the strong support from the administration, that we are rationing money. We are trying to hold down the growth of money, and that is a strong national policy.

At the same time, when we have that as our national policy we see this increased activity in the merger, acquisition process, and so big business is taking up what little credit there is. We see $25 billion lined up for the Conoco takeover by all parties. Well, that takeover took a considerable period of time where they were going back and forth as to who was going to win, ultimately $8 billion for the merger itself, maybe, but during that interim period of time up to $25 billion was actually tied up that would not be available for small business loans.

The concern with the signals that have gone out on the nonenforcement of the antitrust laws—we know that those antitrust laws have helped our small business to compete. They have prevented predatory market practices. Now we see that those laws are under attack by the administration with the Justice Department revising the 1968 antitrust guidelines, and now the signals that Justice is only going to enforce horizontal mergers with no enforcement for vertical mergers.

We know that vertical mergers certainly can create supply squeezes. For an example, the Du Pont takeover of Conoco, Du Pont could cut necessary petroleum supplies to other chemical companies and this would certainly make it easier for Du Pont if we had another oil cutoff, if we had another rationing of oil at some period in time.

Vertical mergers also certainly hurt competition. The Du Pont takeover of Conoco, there is now one less independent oil company, and we know Du Pont could have started its own oil company. It certainly had the resources. Had it gone in that direction, then we would have had tremendous new capital formation. We would have created a lot of new jobs. As it is, basically the money for that goes for Wall Street lawyers and the bankers putting together that merger with no particular new jobs created, simply one less independent oil company.

The concern about the conglomerate mergers—conglomerate mergers of course take the most credit, and the administration has not seemed to express any concern about this. That basic lack of concern I assume comes from the so-called Chicago school of economic thought, that productivity is all you are seeking, and somehow under that school to be big is to have the best productivity. I think that that remains to be seen at all, as to whether that is true or not.

However, we know that small businesses are worried about the conglomerates. They fear that the conglomerates are going to use their size for anticompetitive purposes. They are worried about the cross-subsidization, moving profits from one area to support losses in another and in an effort to drive smaller rivals out of business.

Small business is also worried about entry barriers, the control of resources and patents that make it harder for small business to compete. Conglomerates can stifle innovation and capital formation. I think we know that small business is much more innovative, and while big is not always bad it is certainly not always good either.

Size of course can be important in world markets, and I think we have to look—when we are looking at the competition with Germany and Japan and what they have been able to do with their cartels that they have been able to put together, maybe in that kind of competition—in the international competition we have to look at our antitrust policy. However, certainly when we are talking about our domestic policy we ought to try to keep those domestic protections that we have had.

I think when you look at the number of new inventions, the number of new patents, the number of new processes that have helped to keep this country strong and helped to give us any kind of competition—take our microprocessors and everything that we are doing there—most of those innovations have come out of small businesses that have developed them and will spend some time in developing them. As soon as they seem to get a product, as soon as they have something, big companies then try to go in and take over. However, they are not spending their resources, they are not spending their time in doing that, and once they take over then the innovation simply slows down or stops.

Therefore, I have spent some of my time looking at the credit aspect. I am delighted that this committee is looking at the antitrust aspect because I think somehow we have to reverse some of those signals that have been sent. If we do not, I think what we are seeing now is simply going to accelerate even faster. At a time when we have a recession and small businesses are experiencing greater bankruptcies than ever before, it is very hard for me to explain to them why credit is not available, why we are allowing our antitrust laws to go unenforced.

I think that is something that we definitely must address. I certainly congratulate you on holding these hearings and I am delighted to have a part by presenting my testimony to you.

Senator GORTON. Senator, do you advocate any changes in any antitrust laws or simply a different emphasis on enforcement of present laws?

Senator CHILES. I think basically it is a question of enforcing the ones that we have. I think that perhaps we have to look at horizontal mergers and to see—you know, if you just have a policy where you say as long as a company does not control over a certain percent of a certain product there is never a problem, but then you allow the conglomerate to come in and take some of everything, certainly there is a stage at which that becomes anticompetitive. They get sort of a lock on the board or a great advantage over their competitors.

I think that is a policy. I would not say that our antitrust laws are perfect and that they could not bear looking at. I think they certainly could. However, right now I think almost the worse situation is that those that we have are not being enforced. The signals have been sent out, big is not bad, big is beautiful, we are not going to spend as much time and resources looking at acquisitions. We see that signal coming through Justice; we see some of those same words coming from SEC, all across the board. Certainly that signal has been picked up by big business.

Senator GORTON. Thank you.

Senator Nunn.

Senator NUNN. Senator Chiles, do you have any information, or have you been able to obtain any information that would indicate the real credit effect of these mergers on small business? Is that information available?

I frankly have tried to get it. I have tried a number of sources and I have not been able to get any. The people who have the information also have the policy, I suppose.

Senator CHILES. I think that is true. I think the only thing that we can get right now is the amount of money that is used in these mergers. We know you subtract that from rationed money that is out there and it just has to have an effect.

Of course, as you look at the credit-intensive type of small businesses that are suffering the most—automobile dealers, housing, anybody that has a floor plan and that is all your retail merchants—they are the ones that are suffering the most. Of course, as there is rationed credit then the cost of that credit certainly goes up. Even if they can get it, they have to pay a tremendous sum and in some instances it is driving them into the hands of the factors, out of the banks as such, again where the credit is way over prime, and it just puts them out of business.

Senator NUNN. Not too long ago I complained about the $35 to $40 billion in credit allocation that was being soaked up by the mergers. The rebuttal of that came back to me—and I have forgotten whether the exact source was the Federal Reserve or the administration—the rebuttal was that this money is not all committed, it is simply available for mergers if they take place. Out of the $35 or $40 billion, only $5 or $6 billion is actually going to culminate in a loan.

What do you say about that argument?

Senator CHILES. Well, I think that certainly it is not used if it is not drawn down but I think a bank—if it is Bank of America, Citibank, or one of those banks that gives one of those companies a guarantee that they can get up to $5 to $8 billion—is not going to loan that money out during the period of time that they have made that guarantee. Certainly no long-term loan is going to take place with that money.

Senator NUNN. No, sir. Again, the biggest problem that we have now in business is that long-term money is not available. Everything is on very short term and that again is why the interest rate goes up so high.

Thank you, Senator Chiles.

Senator GORTON. Senator Nickles?

Senator NICKLES. Just a brief question: I looked at—oh, I guess you referred to it a couple of times—the Conoco thing. You mentioned the net price. Senator Chiles, do you think now that that transaction has actually taken place, that that credit is no longer available, say, to small business or to the U.S. economy as a whole?

Senator CHILES. Not the $25 billion or so that was tied up but the $8 or $9 billion that was used in the actual transaction, that is withdrawn, that is taken out.

Senator NICKLES. Here again—not really disputing that but I have tried to follow this through because I had some interest in the transaction—a lot of that went out to those stockholders who turned around and did something with it. Either they went out and bought all-savers certificates, or they bought stock in another company, or they reinvested. I think very few of them put it in a can, so that money has actually recycled its way through the marketplace with the possible exception of the net increase in loans that, let's say, Du Pont or whoever, the acquiring company had. Their net increase in their loans or liabilities would take some drain. However, with that money that they borrowed, they still put it back into the economy somewhere so the economy has some kind of a recycling effect, doesn't it?

Senator **Chiles**. I am sure it does over a period of time. I have a hard time explaining that to my Frigidaire dealer who has just gone out of business, for example, who had a floor plan of 23-, 24-percent-plus interest, and then could not find credit that would be available to start with. Seeing all of this money tied up, explaining to him that eventually all of this will recycle and the money will go into all-savers or the money will go to a stockholder who will buy some other stock in the market—"don't worry, sooner or later all this will come back into the economy."—all he knows is that money is being rationed.

That is a deliberate policy of the country that you are going to ration that money, and yet these tremendous sums of money are readily made available and the Fed has not said one word, that this is not the most productive way we could be using our money now, and the administration has not said one word. When we have asked the Secretary of the Treasury or other high officials of the administration, they have in effect said, "Well, this might be the most effective way that money could be used."

Senator **Nunn**. If I could interject here, one point is that this one transaction is completed but every day we read about other transactions that are churning out this credit, so it is a replacement theory. The credit allocation is still taking place on a tremendous scale, probably far beyond what we know.

Senator **Chiles**. An accelerating scale, that is right.

Senator **Nunn**. Every company I know about, the smaller oil companies and increasingly with banks, are worried about being gobbled up now. How much of that credit they are freezing is unknown, but I think it is a huge amount of money that is being held up there just to ward off mergers and acquisitions.

Senator **Chiles**. You raise such a good point, Senator Nunn: when we are talking about productivity, how much productivity is being lost by companies that are now trying to determine how they fight takeovers? We are seeing all of the sweetheart deals that have to be arranged; you try to find a "godfather" that is going to come in and take you over, if someone else is trying to take you over. Companies are spending all kinds of time on market analysis, hiring people to try to figure out what to do with their stock.

Therefore, you know, what we are talking about in supply-side economics is how do we build new capital formation, how do we create new jobs. I do not think that is happening because I think we are in this merger and acquisition cycle and everybody is deciding how they can take over someone else, or if you are the "takee" you are worried about how you can try to keep from being taken over and you are spending all your time on that. Therefore, we are not out doing what we should be concerning ourselves about.

Senator **Gorton**. Senator Weicker?

Senator **Weicker**. I have no questions.

Senator **Gorton**. Senator Sasser.

STATEMENT OF HON. JAMES R. SASSER, A U.S. SENATOR FROM THE STATE OF TENNESSEE

Senator SASSER. Thank you, Mr. Chairman.

Following on, Senator Chiles, to some of the questions and comments that have been made here this morning, I think you may recall the day that Chairman Paul Volcker of the Federal Reserve Board appeared before the Senate Budget Committee. We were questioning Mr. Volcker about the problem of interest rates and the question of credit controls.

His response was that there were going to be no credit controls. What the Federal Reserve Board was doing was rationing the supply of money, using interest rates. As they tried to keep the money supply relatively constant and the demand for money went up then the interest rates would go up. This was the way that the Fed was planning to ration the supply of money, by interest rates.

It appears to me that when we get this rash of mergers coming along, and $7 and $10 and $12 billion lines of credit being reserved, it appears to me that this certainly bids up the price of money and would have an adverse impact on the interest rate situation. Like you, I have a difficult time following this whole reflow concept, and certainly have a difficult time explaining it to the very small auto dealers in small cities in my State that are paying $15,000 and $18,000 and $20,000 a month just to floor plan their automobiles. They simply cannot make it.

That is my comment, Mr. Chairman. It is a comment more than a question, I suppose.

Senator GORTON. Thank you very much, Senator Chiles. We appreciate your sharing your thoughts with us on this matter.

[The prepared statements of Senators Sasser and Chiles follow:]

STATEMENT OF HON. JAMES R. SASSER, A U.S. SENATOR FROM THE STATE OF TENNESSEE

Good morning, today we are examining the impact of Federal antitrust policies on American small business. I commend Senators Weicker and Gorton for calling these timely hearings.

The Small Business Committee is holding these hearings because we know of the great contributions that small business makes to our economy. Small businesses provide most of our new jobs and provide the lion's share of innovation in our economic marketplace.

But in order to continue such contributions, small business must have an economic marketplace that is fair and competitive. If our national antitrust policy is flawed or defective, small business and the American consumer suffer.

The recent spate of mergers and acquisitions among our very largest businesses may be having a very unsettling effect on American small business. Already we have seen during the first three quarters of this year the announcement of over $60 billion of mergers and acquisitions. This compares with the announcement of some $43 billion for all of last year. On the average for all of 1981, we may have some $7 billion of merger and acquisition activity every month of this year.

And these mergers can be financed almost overnight. For example, DuPont arranged a $4 billion credit line for part of its acquisition of Conoco in just a single afternoon. And this occurs at a time when small business failure rates are 42 percent ahead of last year and when we may well have over 16,000 business bankruptcies before year's end.

The contrast, Mr. Chairman, is unsettling.

Small business cannot raise the capital they need to stay alive, but DuPomt and Conoco—our 14th and 15th largest companies can merge on almost a moment's notice.

And the worst problem with all this is that the American economy got no new jobs from the DuPont-Conoco merger. There was no new oil produced. No new scientific discoveries came out of this transaction. Yet at the same time, some high technology small businesses were being shut out of the capital markets or being forced to pay exorbitantly high interest rates to stay in business.

In short, in our current economy big business seems to be getting bigger while small business seems to be going out of business altogether.

And I might add that the economic profitability of some of our large corporations is rapidly changing our business landscape in a way that seems to invite more mergers and acquisitions.

In a recent study done by the House Committee on Energy and Commerce, it noted that oil and gas firms of the Fortune "500" increased their share of industrial profits from 24.4 percent in 1978 to 42.2 percent in 1980. And between 1978 and 1980, 97 percent of the total change of net income of the Fortune 500-some $19.2 billion—was retained by major oil and gas companies.

Is it any wonder that we see such struggles to acquire Conoco and Marathon Oil?

The administration, unfortunately, seems to be taking an attitude of benign neglect to these various mergers and acquisitions, so I am very anxious to hear from Mr. Miller and Mr. Baxter today as to why the recent spate of mergers and acquisitions of our major corporations will prove to be a boon to American small business.

Thank you.

Statement of Hon. Lawton Chiles, a U.S. Senator From the State of Florida

Thank you, Mr. Chairman. I appreciate the opportunity to appear before the subcommittee today to briefly present my views on the recent wave of mergers and acquisitions. Like many people, I am concerned about the volume and scope of this activity and like others I'm concerned about its long range consequences. While my concerns cover a variety of issues, they focus on the effect of this merger and acquisition activity on small business.

I strongly believe that small business is a fundamental part of our society and the foundation of our economy. It's no secret that small business accounts for the majority of our jobs, and is on the cutting edge of most of our major innovations. We all have a stake in maintaining a healthy and prosperous small business environment and I think we owe it to ourselves as well as the small business community to carefully review this latest wave of massive merger mania. We need to scrutinize the practices and assumptions that accompany the current, "Let's buy 'em up and let's get bigger" attitude and I congratulate the subcommittee for taking a leading role in this effort. Without your concern and initiatives, it's likely that many of the issues surrounding this problem would go unexamined.

We know that we're experiencing an upturn in corporate mergers and acquisitions. In 1975 there were 900 acquisitions valued at $11.8 billion. In 1976, there were over 1,080 transactions with a pricetag of $20 billion. The number of acquisitions in 1977 climbed to 1,182, with a net worth of some $22 billion and in 1978, 1,350 transactions were recorded, with a value of $34 billion. And, as the level of activity increased, so did the size of the individual transaction. During this period, the largest 200 firms were making significantly larger purchases than ever before. Over 120 acquisitions exceeded $100 million in value and another 40 exceeded $300 million. Also, during this period five deals were logged that cost more than $1 billion.

But these figures pale when you look at what's taken place already in the first three quarters of 1981. So far, 1,807 acquisitions have been recorded, a 33 percent increase over figures for the same period last year and about twice the number of mergers in all of 1975. And this number will obviously go much higher before the year is out. Mr. Chairman, do you know what these acquisitions cost? They cost $60.8 billion. That's right, $60.8 billion. That's almost a 100 percent increase over the same period last year and it greatly exceeds the total for all of 1980.

It should be noted that by the end of September we'd already closed five deals valued over $1 billion, the largest being the $8 billion DuPont acquisition of Conoco. What we can see, then, is ever expanding merger and acquisition activity over the recent years, and a particularly significant expansion in 1980 and 1981. And while a great deal of attention has focused on the size of some of these transactions, we must bear in mind that many, many small businesses have been swallowed up through their activity.

As troubling as the numerical and dollar totals are, what is even more troubling are the effects this activity has on small businesses, and their ability to compete in the marketplace. In this regard, let me briefly point out a couple of my concerns. First, I am greatly bothered by the amount of credit that is being diverted away from more productive purposes. It's no secret that, because of the Federal Reserve

Board's restrictive monetary policies, there is less and less credit available throughout the economy. This means its harder for people to buy cars and to build homes. It also means it's harder for small businesses to get the credit they need to expand or maintain their operations and to make investments to improve productivity. Plus, everybody knows that the credit that is available is very, very expensive. I never cease to be amazed, however, that as bad as the credit situation is today, there always seems to be enough money out there for large corporations that want to gobble up their competitors or to acquire firms in other product or geographic areas. This fact can be seen in the enormous credit lines that have been put together for such takeovers as DuPont of Conoco, and for Mobil Oil Company's attempt to acquire Marathon. I've mentioned the sums earlier, but let me repeat them so that we're all aware of the scope of this problem. In 1980, over $44 billion was spent on acquiring other companies. In just the first three quarters of 1981 this figure has risen to over $60 billion. It doesn't thake an economic genius to figure out that tying up this much credit from already diminished credit supplies means it will be that much harder for the rest of the business sector to get the credit it depends on. Moreover, by reducing the amount of available credit, large mergers drive up its cost. Interest rates have already reached new highs and, while they have moderated somewhat in recent weeks, they threaten to remain unacceptably high for the forseeable future. Large diversions of credit for unproductive mergers will only aggravate this problem. And as the price of credit stays high, more and more small borrowers will be squeezed out of the credit markets even if credit is available. This in turn will only force more small businesses on the bankruptcy rocks and will certainly hinder new business formation. I do not think we can afford to foster a set of conditions where only big business has access to the economic lifeblood of credit. Big business is certainly not always the most effecient or the most innovative but they always seem to have the greatest access to the money they need.

I am also concerned about the new attitude we seem to be taking toward enforcement of our antitrust laws. Traditionally, vigorous enforcement of these laws has helped curtail the concentration of economic power in the hands of a few large corporations and has allowed small business to compete fairly. Now, however, we see a change in this attitude. Instead of enforcing these laws, we see them under attack by the administration officials that are supposed to uphold them. The Justice Department recently announced its intention to revise its anti-trust guidelines which have been in place since 1968. Evidently, the Department plans only to enforce those anti-trust provisions that deal with horizontal mergers, or mergers designed to acquire a larger share of the market a company is already involved in.

There are several troubling problems with this proposed shift in enforcement policy. First, the new policy would end over a quarter century of Justice Department involvement in reviewing vertical mergers, or mergers which involve a company and one of its suppliers or its distributors. These mergers may not always appear anti-competitive, but they do present several serious problems. They create a potential for a supply squeeze. Take the DuPont Conoco merger for example. Petroleum is needed as a raw material in the chemical industry. In an oil shortage, DuPont could hurt its competitors in the chemical industry by using all of Conoco's oil for its own purposes, denying it's chemical industry competitors access to the supplies they need to compete with DuPont. Vertical mergers also foreclose competition in an industry. Once again, take the DuPont Conoco case. If DuPont had wanted to become a competitor in the oil industry, it could have entered the industry on its own. It certainly had the financial resources and the expertise to do so, and its entry would have increased competition and stimulated jobs and investment in capital equipment. Instead, it brought up an existing independent competitor. As a result, instead of one more independent competitor, we now have one less. And the funds that could have been used for capital investment went to brokers and Wall Street lawyers.

Another problem with the new enforcement policy is the administration's lack of concern over the rapid expansion of conglomerate mergers. These are the mergers that fall into the grayer enforcement areas but are the ones into which tens of billions of dollars are being poured. Much of the thinking behind this new laxness emanates from the Chicago school of economic thought, and its attitude of, "Don't worry about the anti-trust laws, worry about promoting efficiency—efficiency as we define it". And by efficiency they usuall mean bigness. They assume if a company is big, it got that way by being efficient. Well, common sense tells me that certainly is not always the case. There is no conclusive evidence that I'm aware of to support this notion and, in fact, there exists considerable evidence that conglomerate mergers add little or nothing of real value to the economy. On the other hand, there are valid concerns that large conglomerate mergers pose very real anti-competitive threats to small business, even if a particular merger or acquisition does not run afoul of the existing laws. What small business is most worried about is bigness, bigness that is used to gain an unfair competitive advantage over them. The particular actions they're concerned with vary but a couple need to be mentioned. Probably the most widely held concern is that a large conglomerate will enter a market with a relatively small share abd then use its size and resources to suqeeze out smaller rivals. This can be achieved when the large firm employs profits earned in one of its divisions to subsidize losses in another in anticipation of higher profits once competitors are eliminated. In other words, large conglomerates can outspend and outlose their rivals until such a point as the rivals are driven out of business. Furthermore, many small businesses are concerned about entry barriers that may be erected by large conglomerates. These barriers can take many forms but include cost advantages, economies of scale, control of resources or patients. While they all are different, they all have the effect of forestalling entry of potential competitors, especially small business, into a particular market.

Of special concern to me is the effect large conglomerate mergers can have on capital formation and innovation. I'm very troubled that companies today prefer to acquire other companies rather than make an investment in new plants and equipment if they want to enter a market. The lack of new investment in our industrial infrastructure is one of our major economic problems and it will continue to be so as long as capital is tied up in mergers and acquisitions instead of modernization. I don't think there's much disagreement that a $5 billion sum invested in new plant and equipment will have a much more beneficial impact on the economy than swapping or buying a similar amount of corporate assest. In the former case, the money stimulates business and produces jobs at many levels while the only beneficiaries of a corporate asset reshuffle are a handful of merger attorneys and investment bankers. Innovation also is threatened by large corporate mergers. It's a fact that the greates innovators and inventors of today are the small businessman and the solo researcher. One study showed that of 61 major inventions, only 16 came from large corporations. Another study suggests that economies of scale for innovation could be found in companies of up to 5,000 employees, but not in companies larger than that. While large companies are needed to produce certain very capital intensive products, I think we have a real stake in seeing that conglomerate merger and acquisition activity does not stiffle innovation and product advancement.

Finally, let me add that while I do not believe big is necessarily bad, like many Americans, I do not think it's necessarily good either. There are instances where size is an important factor. For example, I fully appreciate the difficulty many American firms experience when dealing in world markets. This is especially true when they compete with the Japanese and those European countries who vigorously promote corporate expansion. For this reason, I support the idea of a dual approach to anti-trust policies and a modification of those policies that unfairly handicap American companies. I do not, however, believe we can do without adequate anticompetitive protections in the domestic economy. The long and valued tradition of small business in this country holds as one of its beliefs, the notion that undue economic power should not be concentrated in the hands of just a few. The anti-trust laws that have evolved over the years have their philosophical roots in this belief and I am of the opinion that we must maintain consistent enforcement of these laws as long as their economic impact is neutral or minimal.

In conclusion, Mr. Chairman, I again want to thank the subcommittee for giving me this opportunity to speak out on the recent merger and acquisition wave and its effect on small business. I congratulate the subcommittee for its willingness to look at this thorny matter and I am certain that the hearings conducted today will give us all a better understanding of the problems involved.

In my own small way I have been working on this issue by trying to insure that small business, family farms and small financial institutions have access to the credit they need at affordable prices. I've offered a number of amendments toward this end and, in fact, later this week will again raise the issue with the full Senate. While my efforts have focused on the credit aspect, I am glad to know that others are looking at the administration's new attitude toward enforcement of our antitrust laws. I share the concern of many others who fear that large corporations may step up their acquisition activity and anti-competitive practices if they know the Government will no longer vigorously enforce the laws. This is a troublesome prospect for small business since unbridled corporate expansion and predatory market practices may well leave them with no alternative but to sell out. Thank you, Mr. Chairman.

Senator **Gorton**. At this point we will call on Dr. Miller, Chairman of the Federal Trade Commission.

We are delighted to have you with us. That is an impressive stack of papers and books you brought with you. We would be happy to listen to your opening statement but if you will introduce your associates for the record, we would appreciate that as well.

STATEMENT OF DR. JAMES C. MILLER III, CHAIRMAN, FEDERAL TRADE COMMISSION, ACCOMPANIED BY JACK CARLEY, GENERAL COUNSEL; DR. THOMAS CAMPBELL, DIRECTOR, BUREAU OF COMPETITION; AND DR. ROBERT TOLLISON, DIRECTOR, BUREAU OF ECONOMICS

Dr. **Miller**. I will be glad to, Mr. Chairman. I appreciate this opportunity to appear before you today to discuss the issues of antitrust law and its enforcement and the resulting effects on small business.

To my far right is Jack Carley, who is our General Counsel at the Federal Trade Commission. To my near right is Dr. Thomas Campbell, who is Director of the Bureau of Competition at the Federal Trade Commission; and to my left is Dr. Robert Tollison, who is Director of the Bureau of Economics.

Senator **Gorton**. Thank you. You may proceed.

Dr. **Miller**. I thought, Senator, that since my statement has previously been made available to the committee, it would probably be best for me simply to summarize, in the interest of time, if that would be your preference, or I would be glad to read the entire statement.

Senator **Gorton**. You may summarize if you wish. I have had a chance to read your statement; I am not sure that the others have. At least cover its most important points.

Dr. **Miller**. Fine.

Sir, let me just say as a personal matter that I think small business is very important to the economy. I came from a small town in Georgia where many of my friends and some of my relatives were smalltown entrepreneurs. I worked for some small businesses when I was in high school and in college. I think small business is very important to the national economy. It is the source of a great deal of innovation. It provides the starting point for price reductions in many cases, and I have a substantial fondness for small business.

However, it is a matter to me of enforcing the antitrust laws, and considering the impact of firm behavior on competition has to be the focus of my efforts at the Federal Trade Commission.

I would first like to address, sir, the issue of mergers and guidelines. Mergers are very important in the economy, both for positive and negative reasons. They can be very procompetitive, in causing resources to be allocated better in the economy and causing resources to be used better in the economy. But they can also be anticompetitive. The question is, How do we distinguish between those mergers that are procompetitive and those mergers that are anticompetitive?

One thing we could do is to conduct an exhaustive investigation of each merger. That would require so many resources that it would not be worth the effort. On the other hand, we can try, on the basis of what we know—reading the law and the economic literature about the ramifications of proposed mergers—to provide guidelines to determine the best way to channel our resources.

Now the 1968 horizontal guidelines issued by the Department of Justice were based on the best thinking of the time. That was a perception that a correlation existed between the overall level of concentration and the overall profit rates, profit rates being a surrogate for monopoly power. Since then, we have obtained much better data; we have a more sophisticated understanding of the relationship between concentration and profit rates; and this new information has drawn into question the proposition that this is a simple relationship.

Therefore, we at the FTC and officials at the Department of Justice are reviewing these merger enforcement standards to see whether they comport with our knowledge and with decisions being made by the courts today. It seems to me that other factors should also be brought into account, including the possibility of entry from new domestic or foreign competitors. Therefore, I applaud these efforts by both the Justice Department and the Federal Trade Commission.

Let me speak a moment about conglomerate mergers. I do not think the antitrust laws should be used as a blunt instrument to challenge conglomerate mergers. For one thing, this approach has not been sustained by the courts. The courts have not looked favorably upon cases being brought against conglomerate mergers. Another reason is that conglomerate mergers can create efficiencies, and it is in this context that I think that competition is very, very important in separating out those conglomerate mergers that would likely be successful from those that would likely be unsuccessful.

In other words, unsuccessful conglomerate mergers—those that do not create efficiencies—will fail. The marketplace provides the discipline, the profit-and-loss bottom line. On the other hand, those conglomerate mergers that succeed, that create efficiencies, will be successful in the marketplace.

Now with respect to vertical mergers, the underlying raison d'etre of challenging horizontal mergers is lacking in the case of vertical mergers because there is no direct union of competing firms. There is the problem of potential competition, which means that we should look at some vertical mergers. But we should be careful, I think, not to use the antitrust laws as a blunt instrument by trying to go after all vertical mergers.

Now let me mention several concerns I have heard expressed in the Congress and that several of you on the committee have raised with me and that I have looked into. Let me mention three of them.

One concern that we have heard is that there has recently been a merger wave, that we are in the midst of a merger wave. There are really two hypotheses: One is that mergers do move in waves, rhythmic relationships; and, second, that we are in one.

If you look at the data on merger activity, you do see waves, almost monotonic increases and monotonic decreases, and it does seem as though we are in the midst of a rising wave right now. If you look at the data on mergers that I included in table 1 of my statement, you will see that a merger wave peaked in about 1968 and dropped down until about 1972, and has begun to rise since that time.

Yet another hypothesis is that the reason we are in this merger wave or rising crest is that there has been lax enforcement of the antitrust laws. Merger activity is explained by many factors: Changing technology, changing patterns of demand—numerous factors—general economic conditions, in addition to a perception of laxity or strength of public antitrust enforcement.

I would just point out that this merger wave began in roughly 1972 and has continued unabated since that time, and I do not know of any monotonic diminution in the resolve to enforce the antitrust laws. Therefore, I am not particularly taken with the hypothesis that laxity in enforcement of the antitrust laws—or a perception of laxity—has caused a great increase in merger activity.

As a matter of fact, the evidence is mixed. If you look at the number of acquisitions in manufacturing and mining—large acquisitions; that is, firms with assets of $10 million or more—the actual number of acquisitions fell in 1979 versus 1978, although the nominal value of the assets did go up.

I would point out also that the latest figure we have, 1979, is almost precisely the same figure in terms of assets as prevailed in the peak of 1968, and the number of mergers for 1979—97—was substantially less than the 174 that peaked in 1968. In real terms, of course, the asset value would be much lower because we have had inflation over this period of time.

Now let me mention something about aggregate concentration. There is a perception that because we have had a great many mergers or we are in a merger wave, there must be a substantial increase in aggregate concentration in the economy. I do not think the numbers bear that hypothesis out. The evidence is mixed on this, but it does not give strong evidence to the hypothesis I just mentioned.

If you look at concentration of assets for manufacturing corporations, the top 100 corporations in 1974 accounted for 44.4 percent of total assets, whereas in 1980 they accounted for 46.8 percent, a slight rise. The same thing was true for the top 200 firms: a rise from 56.7 to 59.9 percent.

However, on the other hand, if you look at concentration of assets for the total nonmanufacturing sector, for the top 100 in 1974 that figure was 30.4 percent but 29.7 percent for 1977, the latest year we have data for. If you look at the top 200, it was 39.2 percent for 1974 and 38.3 percent for 1977, a slight decrease. The slight decrease is also consistent with the numbers back to 1958, which were, respectively, 31.6 percent and 40 percent.

Therefore, I think the best we can conclude with respect to aggregate concentration is that over time it has been fairly constant. That conclusion comports with research that has gone way back into the 19th century.

Another hypothesis that has been raised is that the merger wave or the recent merger activity has created great strains on credit, and has caused interest rates to rise. Now I do not think there is any question but that high interest rates are a substantial problem for business firms in the United States, small firms and large firms, and this administration is absolutely committed to getting interest rates down. They have begun to come down and I have confidence that they will come down further.

However, let's look at that hypothesis: The first thing to keep in mind, it seems to me, is that interest rates are basically a question of monetary policy. Certainly there are demands on the credit market, but the Federal Reserve Board can accommodate those demands or fail to accommodate those demands as it sees fit. The outcome, of course, is the interest rate change.

The second point is that while the numbers seem very large—billions of dollars, which is a lot of money—compared to total credit outstanding the demands for merger are not that significant. The New York Times reported last summer that the lines of credit for 13 large corporations that were engaged in merger activity, or looking for merger partners, were on the order of $46 billion. However, the total amount of credit raised during the last year at that time—credit used, not lines of credit but credit used—was $528 billion. Therefore you can compare the $46 billion versus the $528 billion.

Another thing to bear in mind is that not all credit lines will be used at any one time. Just because you have a line of credit does not mean you are using it. You know, many of us have checking accounts with lines of credit in case we exceed our account balance. We have a $1,000 limit or a $500 limit or whatever. This does not mean that we are using that credit, but that we have that line to draw on.

Another point is that in the event one company purchases another, many of the funds will eventually find their way back into the credit market, especially when you consider the substantial ownership of corporations by pension funds and by money market funds. These funds will not disappear from the credit market; they will just be shifted from one point to another.

Another point—and I am not sure how important this is because it is such a shortrun phenomenon, but it is a very positive phenomenon in my thinking—is that interest rates have begun to fall. I do not know of any easing of the demands on the credit market from merger activity over the past couple of months, so I think this reinforces the characterization I was making earlier about the main effects on interest rates being beyond the merger activity.

Let me just conclude, sir, by saying that we have a number of other things to do at the Commission in addition to mergers. Concerning enforcement of the Robinson-Patman Act, as you know, sir, and as I indicated in my statement, I am unhappy with the Commission's record in enforcing the Robinson-Patman Act. I promise you, as I have privately, and I promise the other members of the subcommittee, that I will enforce the antitrust laws.

I think that we need to be guided by what the courts have said but we also need to be guided, especially at the stage where we are trying to determine how to spend our resources, by the economic ramifications of proposed mergers and other activity that come under the antitrust rubric. We must not go willy-nilly into different areas. We must use commonsense, it seems to me, in trying to make sure that we give the public the biggest bang for its buck in terms of resources devoted to antitrust enforcement.

Thank you, sir. I will be glad to answer any questions you may have.

Senator **Gorton**. Thank you for that very cogent statement, Dr. Miller. I have a number of questions on specific aspects of your ideas and proposed policies for the Federal Trade Commission, but I would like to start with a short series of a more philosophic nature.

During your confirmation process, in answering a question which I submitted to you, you stated—and I believe I am quoting accurately—"Noneconomic reasons for concern with market concentration are more appropriately addressed by the Congress than by the Federal Trade Commission."

In my opening statement, I quoted Learned Hand in *United States* v. *Aluminum Co. of America,* as having indicated from the history of the antitrust statutes that one of their purposes, and I quote, "* * * was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other."

Is it your position that the legislative history of the various antitrust statutes and the Court interpretation of those statutes dealt purely with economic efficiency as opposed to showing a bias, a concern in favor of the preservation of a large number of relatively small units in relative competitive fields, wherever possible? In other words, isn't it in fact the history of the antitrust statutes and the intent of Congress that if there should be any presumption, it should be in favor of a maximum number of small units and against concentration or mergers?

Dr. **Miller**. Sir, I think the very nature of the antitrust laws themselves and certain court interpretations have given a presumption. If there is a presumption, it is a presumption in favor of smaller units. It comports with the Jeffersonian tradition.

On the other hand, it seems quite clear to me that the focus of the antitrust laws was on competition, on maintaining competition and preventing monopoly. It seems to me that the first question we must address in going after any antitrust violation is whether the effect of the activity would be to substantially lessen competition or tend to create a monopoly, in the case of merger, or the relevant passages from the other statutes or other provisions of the statutes. That has to be the focus, whether the effect would be adverse to competition. The question of the effects on small units is important, but it has to be a secondary consideration to the effects on competition.

With respect to what the law says and what the Supreme Court and other courts have said in this regard, I wonder if Dr. Campbell might have something to say on that?

Senator **Gorton**. I would be happy to hear from him.

Dr. **Campbell**. Yes, Mr. Chairman. Thank you.

I think that Chairman Miller is right and I surely share his perception that, to the extent the courts apply a prejudice, a prejudgment, an assumption in this area, it is that small businesses ought to be preserved, that there is value in small units. I believe that that expression has a manifestation from an economic perspective, which is an appropriate facet in which to view the question for the statutes as they are written.

A small business is more likely to be a price-cutter, everything else being equal. A small business is more likely to be an innovator, everything else being equal. Small business is more likely to fill in the interstices of competition; a major corporation may not.

Accordingly, where we analyze a merger or any particular conduct which has a detrimental impact on small business, it fits within the economic interpretation of the laws—with which I am in total agreement with Chairman Miller—to accord this presumption in favor of small business.

What that leaves, Mr. Chairman, is that if there are any considerations that small business offers apart from the economic ones—and there I do go to the words of the statutes and the judicial interpretations, such as Judge Hand provided—I find there is a realization of a concern for atomization, a beneficial impact from having a large number of small competitors. However, I find it difficult to calculate exactly how that will make one case go one way rather than another, except through the economic perspective, and what I accord as a presumption in that economic perspective that I have just outlined and which I share with Chairman Miller.

Senator GORTON. Therefore, can I summarize the opinion which you have expressed as saying, in the terms of your answer to me during the confirmation process, that while you will define "economic reasons" fairly broadly, you do not believe that there is any implication of the antitrust laws beyond economic reasons; that is, competition. That is to say, a concern over interest rates, over the amount of credit being used for mergers, is simply outside of the pale of antitrust law enforcement.

Dr. MILLER. I think we need to distinguish, Mr. Chairman, between two things. One, in perhaps my naivete in addressing your question, what I thought you had in mind by that question were thoughts along the lines that have been raised by some in Congress that there should be prohibitions against large mergers; that there should be strong action taken to restrain any further increases in the levels of aggregate concentration. I did not have in mind, sir, the kinds of questions you were raising here. I think that the two answers are perfectly compatible.

I do think that the aggregate concentration issue ought to be more the concern of Congress than the Federal Trade Commission. I think that is the appropriate forum to consider such very substantial changes in the way we think about industrial structure in the United States.

On the other hand, concerning the kinds of questions we have just been addressing here, I stand by my statement and I think your summary is fairly on target.

Senator GORTON. Then if it is a concern of Congress that merger waves—the kind of wave in which we find ourselves at the present time—are undesirable per se, if concentration over a fixed percentage or conglomerate consolidation, for that matter, involving companies with more than a fixed amount of assets, or if impacts—if there are some—on the credit markets are our concerns, then you feel that we should pass new and additional antitrust statutes to deal specifically with those questions. Is that your point?

Dr. **Miller.** I think you should, sir. Beyond the kinds of considerations that Tom has just described and I have just described in looking at the overall impact of a proposed merger, I have to bear in mind, Senator, that the courts have not been very lenient in supporting antitrust enforcement against conglomerate mergers, and there have been some very substantital problems in the vertical area. Therefore, it does not make a great deal of sense for the Federal Trade Commission to spend resources chasing after cases that cannot be won.

Therefore, if the Congress does have some concerns in these areas, it seems appropriate to me for Congress to pass a new statute, sir. I have my own judgment and feelings about those kinds of legislative proposals.

Senator **Gorton.** This is particularly true in connection with conglomerate mergers and vertical mergers?

Dr. **Miller.** Yes, sir.

Senator **Gorton.** Now your prepared statement did not totally alleviate the concerns I have previously expressed to you about your position on vertical mergers, which far more clearly are covered by present laws. I am pleased to see that you have corrected the impression from the transition report that enforcement in this area will be almost totally abandoned; but I am still not clear on when you believe vertical mergers to be cause for antitrust concern.

What about a merger which vertically forecloses an independent supplier from a significant portion of the market to which that supplier sells, or vertically forecloses an independent buyer from a significant portion of the market in which he purchases essential supplies? Do you have a specific philosophy on that kind of situation?

Dr. **Miller.** My philosophy is to examine the situation very carefully and to decide whether the impact—essentially the ultimate impact on consumers, but the impact on competition—is going to be, on balance, positive or negative. I think we have to examine these things on the merits and have to make decisions in individual cases based on what the evidence shows. Therefore, I am not automatically ruling out our looking at that area.

The question that I addressed or the issues I was addressing in response to some of your questions, Senator, and some of the issues addressed by the transition team of which Dr. Tollison was a member—and I cannot, on advice of counsel, confirm nor deny that what you have is the transition report.

However, we were addressing there the broad themes in terms of how to go about allocating resources. We have to allocate resources among the competing ends, just as any other agency does.

Senator **Gorton.** In the examinations you have just described, will you also look at the circumstances to determine whether the vertical merger may raise barriers to entry by reducing the unintegrated portion of a customer market, such that vertical integration becomes a practical necessity for entry into the manufacturer's level?

Dr. **Miller.** Of course, we would look at that.

Senator **Gorton.** Will your scrutiny extend to the question of whether the vertical merger may co-opt the most likely potential new entrant to an already highly concentrated market?

Dr. **Miller**. We will look at that. Again, we will have to apply a balancing test. It may be that the advantages to competition would outweigh the disadvantages. Therefore, many times decisions have to be made on the basis of weighing positives and negatives. It is not clear cut one way or the other.

Senator **Gorton**. I do have some additional questions but I think I should now defer, and I will, to Senator Nunn and to the other members of the panel.

Senator **Nunn**. Dr. Miller, I appreciate your being here this morning. I believe this is your first appearance before this committee, is it not?

Dr. **Miller**. Yes, sir, it is.

Senator **Nunn**. I would have to say just as a matter of judicial notice here, if we can take that, that anyone that comes from Conyers, Ga., has to know something about small business. [Laughter.]

Dr. **Miller**. Right. Thank you.

Senator **Nunn**. We are glad to have you.

A minute ago we were talking about the problems of soaking up credit for mergers. I was interested in your observations on that. One thing that you said, if I got these figures correctly, was that at the time the New York Times article came out there was $46 billion in corporate merger-type lines of credit set up, and that was out of a total of $528 billion. I am not sure what that $528 billion represented. Could you clarify that?

Dr. **Miller**. Yes. The $46 billion were lines of credit that had been established by a number of firms. On the other hand, the $528 billion is a figure we have from the Federal Reserve, its an annualized figure of the total amount of credit that would have been raised during the year if it were raised at the second quarter 1981 rate.

Therefore, the $46 billion is really not directly comparable because some of these lines of credit were being used and some were not, just like the example I gave, if you have a checking account you may not use all of your line of credit. Some do not use any, just have it for an insurance policy. Sometimes it is the easy way to take out a loan.

Therefore, the question that I was trying to address is, what impact would this $46 billion have on the overall flow of credit raised? It is difficult to estimate this, but at the outside, even if all that credit were used, it would be only $46 billion out of a total of $528 billion of credit raised.

Senator **Nunn**. It seems to me, though—I come to a different conclusion on that—it seems to me $46 billion out of $528 billion is a relatively large percentage of credit to have been gobbled up in a very brief period of time, centering on only one economic activity; that is, the acquisition of a company. That is more than 10 percent of the total credit in the United States. To have that take place in a very compressed time frame seems to me to be an enormous potential effect on credit markets.

Dr. **Miller**. You would be absolutely right, Senator, if it were not for the fact that these lines of credit are changing all the time. Some firms have lines of credit. Then they will exit and not be interested in acquiring substantial assets, and they will do away with their lines of credit, or they may decide to finance something in an alternative way.

Therefore, I think it would be incorrect, sir, to conclude that that was $46 billion added at the very last minute; or just in that second quarter or the third, to the total amount of credit demands. Again, remember this is a line of credit; this is not actual credit used.

Senator **Nunn**. I agree, but when a bank gives a line of credit like that the bank has to have some form of informal or formal reserve policy to cover that line of credit. Otherwise I would think that the Federal Reserve would really come down very hard on them.

Dr. **Miller**. That is right.

Senator **Nunn**. It seems to me that when they take those prudent steps to cover that line of credit, that they at the very least have to take that money out of anything that would even approximate a long-term commitment.

Dr. **Miller**. I think you are right on that. Therefore, granting a line of credit, from the standpoint of a bank is not costless; it does not mean that it has no effect on the total credit outstanding that a bank may——

Senator **Nunn**. I do not contend that the lines of credit in these mergers have caused all of our tight money, high interest policy.

Dr. **Miller**. I believe you are right about that.

Senator **Nunn**. All I am saying is that when you have a very bad situation going on with interest rates, and the availability of money, and then on top of that you take this wave of mergers, as you have called them, it takes an existing problem and compounds that problem.

Dr. **Miller**. Well, I think it compounds the problem by creating some uncertainty about where the Fed should be going, it seems to me. The Fed cannot fine-tune quite as well as it might like. You know, economists have talked for many years about a theory of the demand for money, and then it suddenly dawned on them that we need to talk about the theory of the supply of money. Frankly, it is not really possible to fine tune the supply of money quite as well as we had thought at one time.

Senator **Nunn**. I agree with that.

Dr. **Miller**. Therefore, it creates additional uncertainty.

However, I am saying, sir, that I do not think that the overall, aggregate credit outstanding or the effects on the interest rate have been really driven by merger activity. They have been driven by the Fed's policies, and I believe to think otherwise would be missing the point.

Senator **Nunn**. The other question on the merger wave—you traced it back to 1968 and you gave figures comparing 1968 to 1978, and 1978 to 1979—do you have any figures on 1980 and 1981? I did not hear any figures from you.

Dr. **Miller**. We do not have those figures today, sir. Dr. Paul Pautler is in the audience here. He is an economist on Dr. Tollison's staff who is responsible for that area. He might be able to give us some——

Senator **Nunn**. If he does have anything available now of how 1981 figures, for instance, would compare to 1980 figures or how 1981 figures in the first 6 months compared to a previous period in

1979 and 1978, what we are talking about in the focus of this hearing is the policies of the new administration.

Dr. **Miller**. Right.

Senator **Nunn**. Comparing 1978 and 1979 and 1968 figures, while historically interesting, does not have anything to do with what we perceive and a lot of our constituents perceive to have occurred in terms of a different thrust, at least, in antitrust policy, followed by what we perceive, rightly or wrongly, to be an intensification of the merger wave if it existed previously.

Dr. **Miller**. Right. A couple of things, sir: We do not have those figures. I wish we did. I wish we had the data to provide you with those figures. We will provide this committee, on a routine basis, with updates of the figures that we come across.

Senator **Nunn**. What is the reporting period for those kind of figures? In other words, when would you have those figures available for 1981, for instance?

Dr. **Miller**. We tend to, perhaps, go into too much detail in some of these reports. The FTC's Bureau of Economics has just issued its statistical report on mergers and acquisitions for the year 1979. Like many Government agencies, we want to make sure our figures are right before we issue them. However, we will be glad to provide you with preliminary figures and——

Senator **Nunn**. Do you think it is possible to get any kind of preliminary figure on 1981—in 1981—or in early 1982?

Dr. **Miller**. I would hope so, using secondary sources if nothing else. We will be glad to supply you with those.[1]

Senator **Nunn**. If we do not find some source of figures, we will be talking with the next administration about the effect of this administration's policy. It could be one and the same. I do not exclude that possibility.

Dr. **Miller**. That is right. I would hope that that would be the case. [Laughter.]

However, Senator, let's draw a distinction here between merger activity that is unsuccessful and merger activity that is successful. It is the difference between dating and marrying. Some of these mergers do not come off.

Senator **Nunn**. I would agree with that. I am not one of those that believes big is bad necessarily. I think there are going to have to be changes in our antitrust laws. I think they are going to have to take into account foreign trade and foreign competition, which we have not done.

I took antitrust courses. I have not had as much experience as our colleague here who was an attorney general, and he has had immense experience in that area. However, I know that we have a lot of outmoded laws.

I think the point that is of great concern to the people that I represent is that when you have a very bad situation for small business going in—you have high interest rates, you have the most bankruptcies we have had in many years, you have all sorts of small business problems—when you take that given situation and then on top of that you have a change in the antitrust policy of the country or a fundamental change at least in perception, and you add on top of that a wave of mergers and a gobbling up of credit, then people begin to wonder what is happening.

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[1] Information not available at time of going to press.

It is the existing situation. You take the situation as you find it. I do not think you can take on new antitrust policies in a vacuum. You have to consider the economic circumstances of the time, and I think it would be fair to say that never in my knowledge, at least in the last 15 or 20 years, has small business been so vulnerable to any kind of economic dislocation. If you take small business vulnerability and you couple that with a tremendous increase in mergers seemingly encouraged by the administration, it is not just an economic question; it is a profound social and political question, as I see it.

Dr. MILLER. I agree with you, Senator. We do have to address those in a broader context.

Senator NUNN. Could you, on that point—and then I will yield because I know my time is up—could you furnish for the record—you mentioned the merger wave, 1968, 1978, and 1979—could you also put on those charts for the record the bankruptcy rate and the interest rates that occurred during that period of time, so we can get some correlation between the two?

Dr. MILLER. I will be glad to do that, sir.[1]

Let me just respond to you—I am a little reluctant to do this because it is a surrogate measure. It is not what you asked for. We do have data on transactions reported under the Hart-Scott-Rodino Act on prenotification of mergers, so we have numbers. These are notices to either the Federal Trade Commission or the Department of Justice about a merger that comes under the guidelines established under Hart-Scott-Rodino. It does not represent a consummated merger but those figures we have. As you know, it went into effect only in August 1978. For the year of 1978, taking into account it went in only in August and that it was a transitional rule at that time, there were 355 notifications, again for less than half a year.

For 1979, the number was 868 prenotifications. For 1980, the number was 824; you see a slight reduction for 1980. For 1981, there was a slight increase; the figure, not counting December which, of course, we do not have, is 944 for 1981.

Senator GORTON. I think those are helpful figures, Dr. Miller.

Dr. MILLER. We will be glad to supply——

Senator NUNN. Well, just for the purpose of supplying these for the record, pretend you are as concerned as I am about what is happening with this merger situation. I know the resources of the FTC and I know you can gather information on any subject in which you have a keen interest in a very rapid period of time. [Laughter.]

Dr. MILLER. I appreciate the confidence you show in us.

Senator GORTON. Senator Nickles?

Senator NICKLES. Thank you, Mr. Chairman.

Dr. Miller, a couple of questions: One, I think a lot of the concern here is exactly what you addressed earlier. It is not the overall idea of mergers, that mergers are bad. I think it is the concern by some Members of Congress, not necessarily shared by myself, that big mergers are bad; that beyond a certain point, if you are talking about big companies merging then that is wrong but no, there is nothing wrong with smaller mergers.

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[1] Information not available at time of going to press.

I think part of your statement—and I read your statement today—was that mergers can be very, very beneficial to bad businesses. As mentioned earlier by Senator Nunn, a lot of small businesses may be going under. A lot of small businesses might have gone under, had it not been for a larger company, possibly with a larger capital acquisition possibility, that could save a lot of small businesses or allow a small entrepreneur to be able to sell that small business at a time that he might not have found a smaller buyer.

Dr. **Miller**. Absolutely.

Senator **Nickles**. I come from a small manufacturing plant, and before that I came from a couple of other small businesses. As a person that had that business, I wanted to sell it to whoever I could sell it to at the best market price available. Exxon did not buy it but——

[Laughter.]

Senator **Nickles** [continuing]. Therefore, you mentioned that you felt that as far as restrictions strictly pertaining to size—I believe, if I heard the correspondence or communication directly—that that would be more of a matter for Congress to deal with.

What is your opinion? Do you think Congress should pass a law that mergers be prohibited if sales exceeded $3 billion a year or some arbitrary figure? Would that be your recommendation?

Dr. **Miller**. No, sir, it would not. I would recommend against that. I think the focus really should be on competition. There are situations in which very large firms in an industry can be very effective competitors, and I just think the focus ought to be on that, rather than on some arbitrary rule about the level of concentration or absolute size.

Senator **Nickles**. However, do you agree with me that the real concern in Congress is not so much in general mergers but the general mergers of larger firms?

Dr. **Miller**. Well, I think the impression I get from Members of Congress is that they are really concerned with mergers among smaller firms, but especially with large firms buying up small firms. Of course, people do not have to sell small firms. Many times it is, like you say, a godsend to an owner of small firm to have a larger firm purchase it. However, I think we need to evaluate in each case the effects of the merger on competition in that industry.

Senator **Nickles**. I agree with you. I think competition is the key word, as long as we are keeping a competitive environment where you can have small firms enter into that marketplace and be able to compete, where larger firms are not automatically excluding them.

A couple of other questions: A lot of focus has been on the capital area and particularly in light of the merger environment of the last several months. Is it true or is it not true, hasn't there been a lot of foreign capital that has been coming into the United States because of the higher interest rates that we now have in relationship to some of the others, and also the fact that our dollar has become more solid and more secure in relationship to other currencies?

Dr. MILLER. That is true, Senator. By the way, the Federal Trade Commission has recently established an international division in the Bureau of Competition to look at such matters as that and other international antitrust aspects. I might want to ask Dr. Campbell whether he would want to comment on that.

Senator NICKLES. Do you have any idea of the amount of foreign capital that has been infused in this year, let's say just this year because I know it has been a dramatic change from the previous years?

Dr. MILLER. I do not have those figures at hand, sir. Maybe Dr. Campbell does, and he may want to comment on some of the other aspects of it.

Dr. CAMPBELL. We will try our best, Senator, to provide an answer in terms of dollars. There certainly have been a number of foreign concerns making acquisitions in the United States this year. Just to address your question qualitatively as opposed to giving numbers on that, in analyzing the economic effect of any such merger we will take into account the fact that the firm making the acquisition is not an American firm. However, the antitrust laws, again, do not give us a great deal of leeway to do that. The best opportunity we have is under section 5 of the FTC Act, which gives us the general obligation to consider the public interest in any matter of enforcement of the antitrust laws.

Senator NICKLES. I appreciate that. I was trying to make that point, I guess, from two angles: One, I can see some disadvantages, particularly in the form of hostile takeovers by foreign firms, if we do not have the same corresponding authority to be able to make a hostile takeover of that firm, that is, the Seagram's deal or some of the other Canadian or French, or any other country. Therefore, I would like to see some type of a free exchange, free on both sides. I am not against hostile takeovers as long as both sides can play that game.

However, there is also the positive, public thing, let's say excluding hostile takeovers, that we are having foreign capital invested in America that is available for small business and available in the general economic cycle in America today in a much greater ratio than what was last year, and I am going to give the administration a lot of credit for this because I think they have seen more resurgence, more faith in our economy. Look at the ratio of what has happened to the Canadian dollar in relationship to the American dollar and other currencies. I think we have seen a positive thing, that the marketplace has somewhat responded to those interest rates.

Specifically back to the FTC, Dr. Miller, I have had a problem to some degree with the FTC, not so much under your administration but under previous administrations, where they have arbitrarily—and I am going to use that term—forced spinoffs. Right now I have been doing a lot of work on the pension field under the PBGC's. We have wrestled with the problem with Bendix spinning off Bassett, Bassett having enormous unfunded liabilities, and the spinoff was directly required because of the FTC in 1974-75.

My point that I wish to make—not to allude to that specific case and get your input on that specific case—is that the FTC should be very, very careful if and when they come up and say, "This is too much of a monopoly and therefore we are going to require a divestiture." They did in this case. They required spinoffs in a few plants and left those few plants with unbelievable unfunded liabilities. They did not require the spinoff company, in that case Bendix, to come up with the assets to cover those liabilities. Therefore, now we have the possibility and in all likelihood the actual realization that all the rest of the employers, small employers too, are going to end up picking up the liabilities because of the action of the Federal Trade Commission.

I do not know if that action has continued to happen but just in this one isolated case we are talking about millions of dollars that all the rest of the employers—very detrimental, in my opinion, to small business because of the action of FTC, presumably under the halo that this was going to be good for competition when in effect it was very bad for competition and for the economy.

Dr. **Miller**. Sir, we will examine those very carefully. I think that case goes back to a consent decree. We at the Commission are undertaking a review of our previous consent decrees to see whether they comport with the present needs.

Senator **Nickles**. Well, I think that would be time well spent. I guess it relates, too, to this idea of are we in a merger climate now. I would make a general comment: I think a lot of business, in view of Congress past attitudes—and I am going to say primarily through the early and midseventies, maybe into the later seventies—there has been such an anti-free-enterprise, free-market spirit in Congress that possibly a lot of businesses were automatically foreclosing any idea of acquisitions.

Now possibly seeing an administration that is a little more in tune with the free-market society, people have started looking again, "Hey, could we better allocate our resources if we spread them around?" I think in many cases it could be very advantageous. I am not just talking about big mergers that are hitting the headlines but many others that are not on Wall Street's front page but still are very important to an ongoing and effective flow of capital into the most productive areas of the economy.

I hope you would look at some of those consent decrees or past actions, and certainly from this point on, to where we do not end up having more of these administrative—I am going to call it a boondoggle—that now we are talking about hundreds of jobs, we are talking about pensions, we are talking about productivity, really all of which have been wasted or squandered basically because of, I think, poor decisions that were made by the FTC in the past.

I compliment you, too. I listened very intently to your comments and also to your response to some very trying questions, and I think you did an outstanding job. I am pleased with the redirection, I think, of what I have been able to see under the FTC.

Dr. **Miller**. Thank you, sir.

Senator **Gorton**. Senator Bumpers?

Senator **Bumpers**. Thank you, Mr. Chairman.

Let me just ask you two or three questions on a slightly unrelated subject. You are quoted in the New York Times—I had an article here a moment ago—have you already been questioned on this?

Dr. **Miller**. No, sir.

Senator **Bumpers**. You are lucky I am here, aren't you?

Dr. **Miller**. Yes, sir, I wouldn't have missed it for anything. [Laughter.]

Senator **Bumpers**. I assume you were quoted correctly. You were quoted as saying that you did not think that the Federal Trade Commission ought to try to protect consumers from misinformation by advertisers. Is that correct?

Dr. **Miller**. No, sir, that is not correct.

Senator **Bumpers**. What is your version?

Dr. **Miller**. I will be glad to supply the committee with a copy of the transcript from that press conference. The reason I held that, sir, is that a number of reporters had asked to talk with me about my own views about matters facing the Commission. I put it off for awhile and finally decided just to let everyone have a chance.

The question came up about the Federal Trade Commission's program of ad substantiation. Now, sir, I am very committed to making sure, pursuant to section 5 of the Federal Trade Commission Act, that firms do not engage in false and misleading advertising. There have been two doctrines under which the Commission has challenged this conduct: The historic doctrine of prosecuting false and misleading advertisers, and the other is something that came out of the *Pfizer* decision of nearly a decade ago called the 'ad substantiation program.'

That doctrine, sir, says that before a company may make a claim containing factual information, it must have a number of studies or a set of research, a substantial defense of that claim in its hands, even though its engineers may report that they know this to be true, that other people know it to be true, and that maybe the consumer himself or herself knows it to be true, but you have to have this body of data for inspection by the Commission.

Now if the Commission challenges an advertisement under the ad substantiation program, it says, "Show me your substantiation." It essentially says that even if the firm can prove that the claim is true, even if it can do studies on the spot and show it is true, even if the experience with the product is such that it is obvious that the claim is true, the firm is guilty of a law violation because it did not have this package of material ready to hand to the Commission before it made the claim. That is what I have been questioning, whether we should require this particular package of materials.

I am a little bit reluctant to use this example because the analogies are not the same in every dimension but it is a little bit like, sir, if the Internal Revenue Code were such that before you filed your tax return you had to have all of your materials in great detail, so that if a tax auditor called you, you said, "Here it is." In other words, the tax auditor could knock on your door and come in, and you were all ready to sit down and prove at that moment in time everything that you had claimed.

Now some people are very risk-averse, and when they fill out their tax returns they go to great detail making notes about things so that if an auditor does come, they will be able to show the auditor that information and will not have to worry about it. Some people are not risk-averse, and they do not want to take the trouble. They say, "Well, the probability of my getting audited is not very high," and they make the claims.

Now the two people may be equally honest. In the latter case, if a tax auditor calls they begin to say, "Let's see, I have to go back and get all my checks out and put them in order, and write everything down so I will be able to show a tax auditor."

I think if the Internal Revenue Code read that you had to have everything ready, there would be an enormous waste of resources. I do not think the American public would tolerate having to get their package ready, or a law that said if they did not have their package ready—even if they could justify every claim they made after the fact—they had to go to jail.

I am saying that we ought to forcefully go after false, deceptive advertising——

Senator **Bumpers**. After the fact.

Dr. **Miller** [continuing]. But the question is, What is the best way to do it? It seems to me that the Commission should at least entertain seriously the prospect of allowing a firm to provide any information at the time the FTC asked them whether they engaged in false or——

Senator **Bumpers**. Dr. Miller, if I understand what you have just said, you are saying that companies are having to give you a lot of preclearance proof that the advertising they are about to claim is substantiated, and they are giving you the substantiation. Now what you are saying is, that is a lot of costly paperwork that companies ought not to have to go through with.

While I am sympathetic to that generally, let me ask you this question: Do you think companies are likely to be as careful about their claims for their products if they do not have to preclear that? They can claim whatever they want to claim and wait for you to challenge them? Do you think they are as likely to be as careful about their claims as they are if they have to get preclearance proof or give you preclearance proof of the claims made for the product?

Dr. **Miller**. Well, it is a little more complicated than that, sir, inasmuch as firms do not file the documents with us today. They do not get preclearance. They have to provide the information after the fact.

Therefore, there would arguably be a little lessening of the accuracy, everything else being equal. On the other hand, I think a little bit of an increase in the effort to challenge false and misleading advertising would be a sufficient additional deterrent to offset any effect there might from any propensity of firms to be a little less accurate because they did not have to have the package beforehand.

Senator **Bumpers**. Dr. Miller, in your press conference——

Dr. **Miller**. That is something I think that the Commission really ought to address.

Senator **Bumpers**. What you are saying here seems to be slightly at variance with the inference I would draw from the question and answer in your press conference.

The question is: "How will they know they are having that opportunity, though, if advertising is unclear?" You answer is: "Consumers, again, are not as gullible as people think. They can make intelligent choices, reasonably intelligent choices, about the quality of products they buy. They do it all the time. They make very important choices on the basis of information that comes to them by word of mouth, by appraising the product in the store and that sort of thing. On the question of substantiation, yes, I personally have strong reservations about the whole substantiation issue."

Now that causes me some pause, not because you are concerned about the cost of the paperwork they are doing but because advertising, even under the very best circumstances, has a tendency to be misleading. Would you agree with that?

Dr. **MILLER**. No.

Senator **BUMPERS**. Well, if somebody puts an ad on television, for example, if you have your way about this and they run an ad for a month before you challenge them, saying, "If you eat one bowl of Post Toasties every morning, 49 out of every 50 bald men have found it will make hair grow on their head"——

Dr. **MILLER**. Sir, that just proves my point. There would be no reason for the Federal Trade Commission to have an ad substantiation program to go after that kind of claim. It is so ridiculous on its face, consumers are not so gullible as to believe it.

Senator **BUMPERS**. Do you believe that?

Mr. **MILLER**. I do not believe——

Senator **BUMPERS**. You do not believe anybody would eat Post Toasties that was baldheaded, after they saw that on television? [Laughter.]

Dr. **MILLER**. I doubt that more than handful would, sir.

Senator **BUMPERS**. Listen, I am going to send you ads out of some magazines that I have seen and ask you what you think about them. I will send you some ads, if I can find them, that have been running for 10 years, that are so patently false on their face, and those people would not still be making the product if somebody was not gullible enough to buy it. That is what consumer protection is all about.

I am not one who believes that you have to have all these forms filled out and I am not for putting an undue paperwork burden on industry but I think there ought to be some legitimacy to their claims. Time and time again we have found that certain claims made for aspirin are not true, and yet billions of aspirin have already been taken based on that claim.

Now it worries me. I will tell you, I am more concerned about your attitude than I am about what you are saying. Your answers seem to obscure the problem, and I have the feeling that FTC is now engaged in abandoning its efforts, and you are cutting down on your staff to enforce competitive practices.

I think that your attitude about the consumer being able to take care of himself is true generally, but there are obviously a lot of faulty products sold in this country every day as a result of grossly misleading advertising. I am concerned that the FTC is just going to abandon their efforts in this.

Dr. **MILLER**. Sir, I hope to lay your fears to rest. First, I cannot comment on the aspirin case because that is in adjudication. On the question, though, of eliminating false and deceptive advertising, we have no disagreement there. I think that we should go after that. The question is how best to achieve that goal. What I have suggested is that perhaps the Commission might be able to achieve that goal without the kind of unnecessary paperwork that you and I agree should be abandoned.

Senator **Bumpers**. Mr. Chairman, I know I have to leave. May I ask one or two more questions?

Did Mobil give you advance notice of their efforts to take over Marathon?

Dr. **Miller**. Under Hart-Scott-Rodino requirements they did, sir. Yes.

Senator **Bumpers**. Did you make any move to discourage that?

Dr. **Miller**. I really should not comment, beyond acknowledging the fact that we did respond to their filing——

Senator **Bumpers**. Did you threaten them with any kind of a legal action to enjoin their takeover of Marathon?

Senator **Gorton**. Excuse me, Senator Bumpers. We have a problem under a court of appeals case in 1966, on going into matters of this nature in any significant degree.

Senator **Bumpers**. Let me just rephrase the question: We have a very unique situation in this country. Let me give you a couple of points to preface my remarks. Business Week reported about 6 months ago that 35 percent of all the corporate profits made in this country last year, excluding financial institutions, were made by the oil and gas industry.

Of all the increased corporate profit in this country from 1978 until 1980, 98 percent was made by the oil companies. Ninety-eight percent of the increased corporate profits over that 2-year period were made by the oil companies.

Now I say that simply to dramatize and emphasize the tremendous amount of cash they have. It is the only industry in this country that has absolutely no cash flow. As a matter of fact, money is running all over the table; they are looking for a place to put it.

For the past year the oil industry in this country has acquired 1.73 companies per month at an average cost of $953 million per month, almost $1 billion a month to acquire other companies, mostly nonenergy-producing companies. But the immediate problem is energy-producing companies.

Now my question is, do you think it is good public policy for the Federal Trade Commission or the Antitrust Division of the Justice Department to ignore these massive takeovers of oil companies by other oil companies, and—to proceed a little further with the line of questioning that Senator Nunn was on when I got here—tie up mammoth amounts of credit in doing so?

Dr. **Miller**. Sir, I tried to address the credit question before you arrived. We have also gone into considerable detail about Mobil's bid to take over Marathon in testifying before the Senate Judiciary Committee.

The basic bottom line on the credit question, Senator Bumpers, was that our perception is that the merger activity has not added substantially to the credit crunch problems or to the interest rate problems.

Senator **Bumpers**. I heard your answer to that.

Dr. **Miller**. The second point is that we have to be very careful here. I, as an adjudicator, cannot comment on the merits of the proposed Marathon-Mobil——

Senator **Bumpers**. Just forget that. I am asking you, as a matter of public policy do you think it is a good idea to allow one oil company to take over another oil company? I do not care whether the price is $100 million or $6.5 billion.

Dr. **Miller**. I think, sir, what we have to do is enforce the law, and that is what I will be guided by.

Now I cannot let drop though, Senator, the implication of your question that we ignored the proposed Mobil-Marathon merger. We have been working very hard, and a team of very well-trained attorneys has been working extraordinary hours on this issue at the Federal Trade Commission.

Beyond that, because of the way the law reads about things I can talk about and those I cannot, I would ask Dr. Campbell, the Director of the Bureau of Competition, to address that and to summarize very briefly for you, sir, our reponse to that proposed merger.

Senator **Bumpers**. Well, the chairman is looking at me with an evil eye so I guess I better quit.

Senator **Gorton**. Dr. Campbell, to the extent that you feel you can do so, you may go ahead with your answer.

Dr. **Campbell**. I would be pleased to, Senator.

Dr. **Miller**. He is not restrained but I am, you see——

Senator **Bumpers**. Good. Let it all hang out. [Laughter.]

Dr. **Miller** [continuing]. As a matter of law.

Dr. **Campbell**. The difference is, by analogy Chairman Miller would be a judge and I would be a prosecutor. Hence, it would not be appropriate for him but it would be appropriate for me.

Senator **Bumpers**. Can he listen? [Laughter.]

Dr. **Campbell**. I think he is listening.

From the very first, our meetings with Mobil have stressed exactly that we may go in and seek a preliminary injunction. Indeed, we would have had very little bargaining position if we did not have that threat against Mobil.

From the very first, their filings under Hart-Scott-Rodino are given to us because we need them to analyze whether there is a likely violation of Clayton Act section 7. Therefore, we communicated with Mobil at an early date, when they first gave notice to us of the filings under Hart-Scott-Rodino. We made contact with Marathon the very day the proposed acquisition was announced and asked for Marathon's assistance in building an antitrust case against Mobil. Without any prejudgment, what we are trying to develop is a case: Do we have that sort of case?

Finally, let me just say that I am very proud of the attorneys in the Bureau of Competition who have worked, despite the intervening holidays, without stop, the only exception being the day when it was against the law for us to work——

[Laughter.]

Dr. **Campbell** [continuing]. And have given maximum effort to this. So much so, Senator, that I believe we have investigated this, and continue to investigate this, with the utmost thoroughness, and have done absolutely nothing to encourage—I am trying to use your term, if we encouraged it—we have done nothing to encourage Mobil's bid, but rather have at every point challenged that under the antitrust laws to see if we had a case that would pass muster under Clayton Act section 7.

Senator **Bumpers**. If I can just summarize, Mr. Chairman, that "encouraged" is precisely the reason for this hearing today. Everything I have seen from both Mr. Baxter in the Antitrust Division of the Justice Department, everything I have heard coming out of the Federal Trade Commission, indicates that inaction is going to be the rule. I think that encourages this rash of mergers and takeovers that are occurring in this country, which I think are anticompetitive, tying up credit and depriving small business of credit.

I know that $45 billion or $46 billion does not sound like much in the whole scheme of things but if that is 10 percent of the credit available in this country, that is several tens of billions of dollars that is not available to struggling small businesses who are the ones suffering most in this country.

Now this is not posturing, and this is not just pandering or catering to the small business community. It just so happens that bankruptcies among small businesses are up 60 to 70 percent. Anybody in the U.S. Senate or the Congress that is not alarmed about that has no business being here, and that is the whole purpose of our being here. I think there is being manifest in both those departments an encouragement to these mergers, as I say, which I think are taking a terrible toll on our economy.

I will close with that, Mr. Chairman.

Senator **Gorton**. Dr. Miller, you certainly may comment if you wish.

Dr. **Miller**. Well, sir, I would refer back to my testimony in addressing some of the concerns that Senator Bumpers has expressed. In the case of Marathon-Mobil, I think we at the FTC have done a very fine, professional job in responding to that under the antitrust laws.

Senator **Bumpers**. How about Texaco and Conoco?

Dr. **Miller**. That, sir, was addressed by the Department of Justice and it was addressed by them before I went to the Federal Trade Commission.

Senator **Bumpers**. Thank you, Mr. Chairman.

Senator **Gorton**. Senator Rudman?

Senator **Rudman**. I do not have any questions of this witness.

Senator **Gorton**. Dr. Miller, I have a number of other questions. Because of the press of time and because we have other witnesses, I will submit all of them but one in writing. I would like to follow up with one question. Again, I do not wish to misstate your philosophy at all, so you correct me if I do so.

However, it is my understanding that your general philosophy on mergers is that an appropriate free market will encourage mergers primarily or solely, if the free market works accurately, of relatively inefficient or ineffective companies; that targets of mergers more often than not in a free economy are going to be those which can be run more profitably and more effectively by better management; that there should be more fear on the part of poor management than good management of mergers of whatever kind. Does that correctly state your philosophy?

Dr. **Miller**. That is largely correct. Inefficient managers have something to fear from takeovers. I would not say that only inefficient firms merge or that only efficient firms take over inefficient firms. There is first the question of knowing in advance whether a merged firm will be efficient or not, and that is one reason the competitive process is so important.

We see mergers that fail, and that is a very good sign. We want the competitive system to work and to make sure that it provides the discipline for people who would propose mergers to know what they are doing, to study the likely impacts very carefully. However, two efficient firms might merge, too, for symbionic reasons, because they have offsetting, very compatible resources, for example.

Senator **Gorton**. However, is it not correct that at least a good deal of the incentive for many mergers—during the course not just of this year or this administration but for at least half a decade—has been because the stock market has been so depressed over an extended period of time, that a majority of companies, efficient as well as inefficient, are selling at stock prices which are considerably below their asset values? Even very efficient companies, the independence of which is beneficial to the economy, become targets for mergers by reason of that phenomenon.

Dr. **Miller**. That is right. But this is essentially saying that those resources in that efficiently managed firm might be put to better use somewhere else. It is an anomaly. It reflects partly the tax structure, it reflects a number of things but it is somewhat of an anomaly that, as you say, the asset values measured by stock prices do tend to be much below replacement cost in many of these industries. It has to do with our accounting system and a lot of other things.

Therefore, it is true that an efficient firm may be merged or bought, but let's keep two things in mind: One is that we have to look at the competitive impacts to make sure that there are no adverse impacts on competition. Second, for one firm to buy another firm is not a disaster for the firm that is being purchased. It essentially represents the choice of the owners to accept the price offered by the firm that wishes to merge, as being better than retaining the ownership of the firm prior to its merger.

Senator **Gorton**. However, I take it that that leads us back to what you so candidly said in your own testimony: If we feel that the type of merger which you have just described is socially or politically undesirable, if we feel that it is economically undesirable, then it is up to us in Congress to pass additional antitrust laws, to pass additional restrictions which are not currently found in statute law. Is that your position?

Dr. **Miller**. Yes, sir. That is my position.

Senator **Gorton**. Thank you very much, Dr. Miller. We appreciate your being here.

Dr. **Miller**. Thank you. I will be glad to answer your questions.

Senator **Gorton**. We will submit additional ones to you in writing.

[The prepared statement of Dr. Miller and subsequent information follow:]

Prepared Statement

of

James C. Miller III
Chairman
Federal Trade Commission

before the

Productivity and Competition Subcommittee of the
Committee on Small Business
United States Senate

December 1, 1981

Mr. Chairman and Members of the Subcommittee: I appreciate this opportunity to appear before you today to present my views on federal antitrust policy as it affects small business. The views I will present are my own and do not necessarily represent those of the Commission.

Let me start by saying I face these issues with a keen awareness of the important role that small business plays in our economy. I grew up in a small town in Georgia where certain members of my family and their friends struggled as private entrepreneurs. Some of my fondest memories are of learning important lessons of life while working for small businesses and operating my own grass-mowing enterprise.

But personal experiences aside, as Chairman of the Federal Trade Commission, I am charged, along with my colleagues, with enforcing the laws enacted by Congress. This means targeting our resources well and basing decisions on findings of fact, both of which require a thorough assessment of, and appreciation for, the economic ramifications of business behavior and regulatory action.

Mergers and Merger Policy

Let's start with mergers. In my view, mergers play an important and often procompetitive role in our society. Among other things, mergers, or the threat of take-overs, can pressure managers to use resources more efficiently in responding to the demands of consumers; they provide a means by which the activities of one firm can be combined relatively quickly and easily with those of another in order to reduce costs; and they are a means by which those who have spent time and effort and have risked their capital in building a business can sell their assets in a timely fashion to those who will turn them to best account. Thus, permitting the acquisition of independent entrepreneurs may provide people the incentive to start new companies by rewarding a lifetime of work with the lucrative sale of a successful small business. Some mergers may also have a larger public benefit in that the small entrepreneur may not have the same capital or marketing expertise to exploit his new ideas that the larger acquiring firm can provide.

On the other hand, mergers, particularly those involving directly competing enterprises, may result in firms with significant market power over the prices they charge and possibly the rates and timing of innovations and product improvements. These are the mergers that should be of primary concern to the FTC, and I will vigorously pursue this course during my tenure as Chairman.

The difficulty lies in distinguishing those mergers which are likely to have adverse effects from those which are not, or in distinguishing those mergers where the adverse effects are likely to offset the advantages, since both may occur simultaneously. To identify with precision the advantages and disadvantages of each proposed merger on an individual basis clearly would require more resources than are justified. Therefore, it makes sense to identify the broad categories of mergers that are more likely to create problems and to concentrate the government's enforcement resources on them.

Horizontal Mergers

In looking for guidance on which mergers need to be addressed, strong reliance has been placed on the work of economists showing positive relationships between industry profitability and levels of concentration. In short, the implication is that horizontal mergers should be deterred because they increase concentration and lead to higher profit rates, which is a manifestation of monopoly power. This approach is reflected in the Department of Justice's 1968 horizontal merger guidelines and in the FTC's internal case selection process.

In recent years the Department's guidelines and the policy they embody have been subject to strong criticism. In broad terms, these criticisms relate to arguments that: (a) cases are brought where the probability of anticompetitive behavior is remote, even assuming the validity of the earlier studies on concentration and profitability; (b) the relationship between concentration and profitability is weaker (perhaps non-existent) and much less well understood than it had previously been supposed; and (c) the appropriate interpretation of this relationship is that larger competitors actually generate the higher profits by being relatively more efficient rather than by pricing anticompetitively, so that a broad challenge to horizontal mergers becomes a more costly policy than previously thought to be the case. Furthermore, it has been argued that the government's approach to merger cases has failed to give appropriate weight to factors other than market shares and concentration that are important for sensible decisions. These include: (a) realistic consideration of the time within which entry or expansion of output could occur should a particular merger result in monopolistic pricing or other anticompetitive effects; (b) the efficiencies likely to result from a merger;

(c) the constraints imposed by foreign producers and by producers of closely related products; and (d) a variety of other factors thought likely to affect the probability of successful anticompetitive behavior.

A panoply of factors affecting the economic ramifications of mergers and constraints on them is under serious review by the staff of the Commission. What factors should be taken into account in the analysis of any merger, the feasibility of incorporating them formally into horizontal merger guidelines, and whether the Commission's own implicit decision rules should be revised are questions now being reviewed. Although it is too soon for me to make any specific recommendations, I strongly support the Commission's efforts to improve its analysis of horizontal mergers and to adopt any changes which on the basis of solid evidence seem clearly warranted.

Conglomerate Mergers

The recent increase in conglomerate merger activity, about which two of my colleagues on the Commission, David Clanton and Michael Pertschuk, recently testified before the House Subcommittee on Monopolies and Commercial Law, is of concern to us all and naturally leads one to consider whether the antitrust laws might be applied to restrain conglomerate mergers. In my view we should scrutinize conglomerate mergers for possible anticompetitive effects, but should resist the temptation to use the antitrust laws as a blunt instrument to take after conglomerate mergers generally. I would add that this view is consistent with the FTC's historic enforcement strategy in this area; the Commission has not challenged a transaction based solely on conglomerate merger theory (other than potential competition) for more than a decade.

The acquisition of a company by a firm which has interests in unrelated enterprises, unlike a merger between actual or potential horizontal competitors, has no direct anticompetitive effects. Indeed, as far as I am aware, the principal complaints against the conglomerate mergers relate to broader social and political concerns, which, in my view, are outside the scope of the existing antitrust statutes.

It is often claimed that conglomerate mergers do not promote any real economic efficiencies, and so it would not be costly to society if they were proscribed. The evidence tends to show, however, that some conglomerate mergers are efficient, even though others are not. In this regard I cannot emphasize too strongly the importance of competition in sorting out the efficient from the inefficient cases. Those merged firms that turn out to be inefficient will find resources harder to obtain and may be forced to dispose of some of their constituent parts. The efficient merged firms will succeed. This potential for efficiency gains or losses provides a powerful discipline on those proposing conglomerate mergers or arranging conglomerate merger partners.

In short, I do not believe a convincing case has been made to support a broadside attack on conglomerate mergers. And until it has, I think we would be wise to target our resources on clearer threats to competition.

Vertical Mergers

As in the case of conglomerate mergers, vertical mergers generally do not involve the elimination of direct competitors, and, as a consequence, they are generally far less troublesome than horizontal mergers, and their anticompetitive effects are more difficult to analyze or predict. In other words, the basic underlying reason for challenging horizontal mergers -- that they pose a direct threat of less competition among rivals -- is lacking. I believe that the caution which both the Department of Justice and the Commission have shown in recent years toward challenging vertical mergers is sound and reflects an awareness of this fact.

Another caution about challenging vertical mergers is that they are commonly based on efficiency considerations. These efficiencies may stem from a desire to diminish risks or marketing costs, or they may be the result of strictly technological considerations. As a consequence, broader challenges to vertical mergers are not likely to generate many benefits in terms of preserving competition, and, therefore, on balance, such challenges are likely to raise costs to consumers.

I do not mean to imply that large vertical mergers should not be carefully examined by the Commission, since there may be instances where such mergers may create competitive problems. But these instances require careful analysis on a case-by-case basis, and I would prefer to be convinced by evidence that the competitive harm to consumers resulting from a proposed merger is unlikely to be offset by any improvements in competition likely to flow from it.

I should note that the Commission is reviewing its vertical merger policy as well as examining the Department of Justice's vertical merger guidelines. The overall aim is to discover how our analysis can be improved in light of the recent work of economists and legal scholars in this area, whether the guidelines are consistent with current practices and court decisions, and, in light of all this, whether revision of the guidelines would be beneficial. As before, it is too early for me to discuss any specific recommendations, although I strongly support these review efforts.

Robinson-Patman

Another area in which the Commission has antitrust enforcement authority is price discrimination. The principal standard here is the Robinson-Patman Act.

Frankly, I have been critical of public enforcement of the Robinson-Patman Act. Like many who have studied this issue, I find it an anomaly that, while Robinson-Patman Act enforcement tends to be approved as an article of faith by many small businesses, the evidence shows that the Act's enforcement -- especially by the FTC -- has generally not benefited small business.

Consider the words of Professor F. M. Scherer, a former Director of the FTC's Bureau of Economics:

> There is . . . irony in the FTC's enforcement record. [T]he Robinson-Patman Act was passed to help small businesses. Nevertheless, of the 564 companies named in FTC Robinson-Patman complaints between 1961 and 1974, only 36, or 6.4 percent, had annual sales of $100 million or more at the time of complaint. More than 60 percent had sales below $5 million. Thus, the brunt of the Commission's enforcement effort fell upon the small businesses Congress sought to protect. 1/

In light of this record, I think it behooves the Commission to consider very carefully the likely effects of Robinson-Patman cases before directing substantial resources to this area. Obviously, the Commission should be vigilant in preventing price discrimination that encumbers competition. And I also take very seriously the role played by small business in spurring competition in many industries, so that the interests of the ultimate consumer may well be the same as the interest of small business.

1/ F. M. Scherer, Industrial Market Structure and Economic Performance (2nd ed.; Chicago: Rand McNally College Publishing Company, 1980), p. 581.

Related Concerns

In light of this Subcommittee's concern over antitrust policy as it affects small business, it might be useful for me to address several general concerns that have been raised about the aggregate effects of recent merger activity.

Merger waves. The recent rise in merger activity has prompted speculation that we may be in the midst of a "merger wave" caused by "lax" antitrust enforcement, and that the approval of a few controversial mergers may trigger many more mergers. It is useful in this regard to consider the matter in historical perspective.

The data do support the notion that merger activity tends to move in "waves" and that we are in the midst of one. (See Table 1.) However, the rate of merger activity is explained by many variables in addition to the stringency of antitrust enforcement; indeed, these other factors tend to be far more important. Note, for example, that the current "merger wave" began in the early 1970's, and there is little reason to believe that antitrust enforcement has grown progressively more lax since that time. Moreover, there is little evidence that approval of a merger in one industrial sector prompts mergers in other sectors, or even that approval of a merger in one industry triggers other successful mergers in the same industry.

Aggregate concentration. Because of increased merger activity, there is a natural tendency for some to conclude that the degree of concentration in the American economy has greatly increased during recent years. Actually, this is not the case. Since 1974 the proportion of all manufacturing assets held by the top 200 manufacturing corporations has only risen from 56.7 percent to 59.9 percent. (See Table 2.) If we look at aggregate concentration in the broader category of all nonfinancial corporations, we find that aggregate concentration has actually fallen somewhat since 1958. In that year the top 200 nonfinancial corporations held 40.0 percent of all nonfinancial corporate assets, whereas they held only 38.3 percent in 1977. (See Table 3.) These figures suggest that since 1958 we have observed a relatively stable level of aggregate concentration rather than a rising trend. We should also bear in mind that the ownership of corporate assets is dispersed widely through the economy, especially when one considers the holdings of mutual and pension funds.

Supply of credit. Still another concern is that current merger activity is garnering a substantial proportion of available credit and is thus raising interest rates, harming all businesses, small and large.

Whether borrowing by individual corporations to finance mergers will have a significant impact on the general level of interest rates is basically a question of monetary policy. If the Federal Reserve System responds with a more liberal monetary policy, then the credit demand for merger activity need not raise interest rates. In any event, the effect of merger activity on the credit market -- as large as the numbers seem -- is likely to be fairly small.

For instance, the credit lines established by Mobil to purchase Conoco and later Marathon amount to approximately $6 billion. Marathon has also obtained interim financing of $5 billion, presumably to fight the takeover bid. These credit lines appear to be sizeable and generally in line with the magnitude of credit lines established this summer by several large corporations. (See Table 4.) Reportedly, the credit lines established last summer by 13 large corporations amounted to approximately $46 billion. Although this amount of borrowing seems staggering, it is not so large when compared to the total credit raised in all sectors of the economy. For instance, during the second quarter of 1981 total funds raised (at an annual rate) amounted to some $528.5 billion. 2/ The Mobil and Marathon lines of credit amount to only 2.1 percent of this total.

2/ See Federal Reserve Flow of Funds Accounts, Quarter II, August 1981, p. 3.

In addition, one would not expect all of the available lines of credit to be used at any one time. For instance, the credit lines established this summer have not all been used, since only DuPont actually needed to pay for Conoco stock. (That is, Mobil and Texaco would not have needed to use their lines of credit.) To the extent that lines of credit are not activated, the funds are not removed from the flow of funds available. 3/ A related effect is that once a line of credit is drawn down for the purchase of the assets of a merger partner, the recipients of the funds will presumably reinvest the proceeds. Thus, some of the funds will flow back into the pool of credit available to other investors.

A final observation may be relevant. The existence of the credit lines did not seem to stop the rate of interest from falling over the past month, and I know of no evidence that corporations have reduced their credit lines to cause such an effect.

3/ Banks do impose charges for established lines of credit, and a firm would not have an incentive to leave an unused line open for too long. However, until the firm draws on the line of credit the financing banks can continue to lend the funds to alternative borrowers.

Concluding Remarks

As Chairman of the Commission, I will support vigorous enforcement of the antitrust laws against mergers that substantially lessen competition or tend to create a monopoly. I will also support Commission enforcement of other antitrust laws for which the Commission is responsible. I strongly believe in the desirability of this policy and will work towards its clear and sensible application.

Furthermore, I intend to see that the Commission fulfills its potential in addressing the problems faced by small business. For example, the Bureau of Economics is presently engaged in studies of inventory tax relief for small business, the influence of inflation on the debt position and capital of small and large firms, the relation between firm size and the cost of capital, and competition in retail markets. I believe that these reports will provide the Commission with an informed perspective on small business as it goes about its deliberations and decision making.

The Commission is also continuing its policy of identifying regulatory impediments to small business. These range from licensing arrangements imposed by Federal and state governments to the ubiquitous paperwork burden - a matter of special interest to me, given my previous position as Administrator for Information and Regulatory Affairs at the Office of Management and Budget.

Finally, the Commission plans to expand its informal liaison with the small business community. Since coming to the Commission I have met with several small business groups and their representatives, as have my fellow Commissioners. Such activity will not only continue, it will expand in scope.

* * * * * *

Mr. Chairman and Members of the Subcommittee, this concludes my prepared statement. I shall be happy to address any questions that you or other Members of the Subcommittee might have.

Table 1

Large Acquisitions in Manufacturing and Mining, by Year, 1948-1979

Year	Number of Acquisitions	Assets 1/ (in Millions of Current Dollars)
1948	4	63.2
1949	6	89.0
1950	5	186.3
1951	9	201.5
1952	16	373.8
1953	23	779.1
1954	37	1,444.5
1955	67	2,165.7
1956	53	1,882.0
1957	17	1,202.3
1958	42	1,070.6
1959	49	1,431.1
1960	51	1,535.1
1961	46	2,003.3
1962	65	2,251.9
1963	54	2,535.8
1964	73	2,302.9
1965	64	3,253.7
1966	76	3,329.1
1967	138	8,258.5
1968	174	12,580.0
1969	138	11,043.2
1970	91	5,904.3
1971	59	2,459.9
1972	60	1,885.5
1973	64	3,148.8
1974	62	4,466.4
1975	59	4,950.5
1976	82	6,301.8
1977	101	9,166.6
1978 2/	111	10,724.3
1979 2/	97	12,867.1

1/ Acquired firms with assets of $10 million or more.

2/ Figures for 1978 and 1979 are preliminary.

NOTE: Not included in the above tabulation are companies for which data are not publicly available. There were 523 such companies with assets of $13,802.9 million for the period 1948-1978.

SOURCE: Bureau of Economics, Federal Trade Commission.

Table 2

Concentration in Assets for Manufacturing Corporations (Percent)

Asset Size Group	1974	1975	1976	1977	1978	1979	1980
Top 100	44.4	45.0	45.5	45.9	45.5	46.1	46.8
Top 200	56.7	57.5	58.0	58.5	58.3	59.0	59.9

SOURCE: Bureau of Economics, Federal Trade Commission.

Table 3

Concentration in Assets for the Nonfinancial Sector (Percent)

Asset Size Group	1958	1963	1967	1972	1974	1975	1976	1977
Top 50	23.9	24.2	24.5	23.2	23.2	23.3	23.3	22.7
Top 100	31.6	31.3	31.9	30.5	30.4	30.6	30.4	29.7
Top 150	36.5	36.3	37.1	35.7	35.5	35.6	35.3	34.5
Top 200	40.0	39.9	41.0	39.7	39.2	39.5	39.1	38.3

SOURCE: Bureau of Economics, Federal Trade Commission.

Table 4

Line of Credit for 13 Large Corporations (Billions)

Allied Corporation	$2.0
Cities Service Co.	4.0
Conoco Inc.	3.0
E. I. du Pont de Nemours & Co.	4.0
Gulf Oil Corporation	6.0
Marathon Oil Co.	5.0
Mobil Corporation	6.0
Northwest Industries	1.0
Pennzoil Co.	2.5
Phillips Petroleum Co.	1.0
Joseph E. Seagram & Sons	3.9
Texaco Inc.	5.5
U.S. Steel	3.0
TOTAL	$45.9

SOURCE: New York Times, August 10, 1981.

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United States Senate
COMMITTEE ON SMALL BUSINESS
WASHINGTON, D.C. 20510

February 11, 1982

Honorable James C. Miller
Chairman
Federal Trade Commission
Pennsylvania Avenue at 6th Street
Washington, D. C. 20580

Dear Mr. Chairman:

In follow-up to the hearing on Antitrust Policy and Its Impact on Small Business held by the Subcommittee on Productivity and Competition on December 1, 1981, enclosed are questions for the Record submitted by Members of the Committee.

Your timely response will be appreciated.

Sincerely,

LOWELL WEICKER, Jr.
Chairman

Enclosure

FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

OFFICE OF
THE CHAIRMAN

April 5, 1982

The Honorable Lowell Weicker, Jr.
Chairman, Committee on Small Business
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your letter of February 11 in which you transmit questions relating to my appearance before the Subcommittee on Productivity and Competition on December 1, 1981.

Enclosed please find my responses. Should you have further questions, please contact me.

Sincerely yours,

James C. Miller III
Chairman

ROBINSON-PATMAN

Question 1: The Reagan Administration's Transition Team on the Federal Trade Commission, which you headed, stated in its report to the President that the Commission's Robinson-Patman activity has not "tended to help the small business community;" you repeated that claim at a press conference in October, stating flatly that "Robinson-Patman Act cases have not benefited small business." What is your support or substantiation for that claim?

ANSWER: As support for the view that the Commission's Robinson-Patman cases have not benefited small business, I refer to statistics reported in Professor Scherer's book, F.M. Scherer, Industrial Market Structure and Economic Performance (2nd ed. 1980) pp. 580-82. Professor Scherer reports that of the 564 companies named in Commission Robinson-Patman complaints between 1961 and 1974, more than 60 percent had sales below $5 million. Professor Scherer also finds that between 84 and 95 percent of the respondents with sales less than $10 million settled cases without litigation compared to only 37 percent for companies with sales more than $100 million. Moreover, 23 percent of the companies with sales exceeding $100 million ultimately succeeded in having complaints against them dismissed compared to no companies with sales less than $10 million.

These figures indicate that most cases have been initiated against firms which are absolutely quite small, and that because of their size it is doubtful that they would have market power sufficient to cause them to price discriminate in the sense reflected in response to Question 2. In addition, it would appear that these small firms were relatively less able to withstand the resource drain necessary to defend against a Commission suit than were the larger companies. In summary, these figures convincingly show that small business was the object of Robinson-Patman enforcement rather than the beneficiary.

Question 2: In answer to a question submitted to you after confirmation hearings, you affirmed that "[t]he Robinson-Patman Act is the law of the land, and I would enforce the laws entrusted to the Commission." As chief executive officer of the Federal Trade Commission, will your administration continue to assume the Federal Government's responsibility to enforce Robinson-Patman? What Robinson-Patman enforcement initiatives are now in the works under your leadership? How many Robinson-Patman investigations have been initiated since you took over? What kinds of Robinson-Patman cases are you looking for?

ANSWER: As I have stated in prior responses, it is my intention to enforce the laws entrusted to the Commission, including the Robinson-Patman Act. Thus, in my administration at the Commission, Robinson-Patman enforcement responsibility will continue.

Since I became Chairman, Robinson-Patman enforcement initiatives which were ongoing have continued. These initiatives include six matters in various stages of litigation in the areas of office supplies, bread, coffee, newspaper advertising, rental cars and men's toiletries. In addition, there have been during the course of my chairmanship about 15 active Robinson-Patman investigations. Since October 1, 1981, four new investigations have been commenced.

There appear to be two principal aims of the Robinson-Patman Act: 1) the protection of a small competitor from predatory price-cutting by a large competitor, and 2) the protection of the small buyer from the large buyer who may use its economic power to secure advantages not available to the small buyer. The first goal is secured through cases involving injury to competitors from price discrimination on the "primary" line and the latter, injury to competitors on the "secondary" line. Standards of proof in primary line cases as established by the Commission and the courts over the years are fairly rigorous. I anticipate that the Commission would continue to investigate instances which appear to meet those standards and which pose a real threat to competition for reasons unrelated to efficiency.

On the secondary line, the kinds of cases I would be looking for fit closely what I take to be the primary aims of Congress and which further the social goals the law seems clearly designed to promote. Fundamentally, the emphasis of the Robinson-Patman Act concerns the ability of large buyers to use their power to exact price concessions from suppliers that are not available to the large buyers' smaller competitors. The price concessions are "unearned" and reflect the large buyers' power rather than lower costs.

The primary social goal promoted by this Act is to place large and small buyers on a "fair" and equal competitive footing. If the large buyer then grows at the expense of the small, this will be the result of fair and open competition and a reflection of true differences in efficiency. It will not be the result of "unearned" differentials that do not truly reflect differences in efficiency. This is a social goal of great importance and one that I feel is sound.

The concern with the power of the buyer is reflected in the way the Robinson-Patman Act is constructed. Section 2(f) prevents the large buyer from inducing price differences violative of Section 2(a). Section 2(a) makes it unlawful for the seller to discriminate in price among its competing buyers unless the lower price is made in good faith to meet an equally low price of a competitor or is a reflection of lower costs. Section 2(a) helps protect the seller (it is hoped particularly the small seller) from efforts by large buyers to exact price concessions since these cannot legally be granted, unless either of the defenses prevail.

These defenses also protect the seller in the sense that the law as written does not prevent the seller from meeting competitive offers or from lowering prices to particular buyers in response to lower costs. Both defenses, if properly interpreted, promote society's interest in efficiency and competition.

In general, this summary reflects the kinds of Robinson-Patman cases I would look for: Those where the seller has market power leading it to discriminate in violation of the law; or those where the large buyer has market power which can be shown to result in price concessions not available to its smaller competitors and which are unrelated to differences in a reasonable estimate of the seller's costs.

Question 3: In its 1976 Report on the Robinson-Patman Act, the Department of Justice stated that the Robinson-Patman Act fosters inefficient and costly distribution patterns, often to the detriment of consumers and small businessmen. Report at 75-79. As an economist, do you share this opinion and, if you do, do you have any empirical data supporting your view that the Act fosters inefficient and costly distribution patterns? Please provide any such data that you may have.

ANSWER: As an economist, I do feel that the enforcement of the Robinson-Patman Act has often fostered inefficient and costly distribution patterns to the detriment of consumers and in many cases to small businessmen. Support for this view does not come from a clear body of empirical evidence -- in fact, the true net effects of Robinson-Patman have not, as far as I am aware, been the subject of much solid empirical work. The criticism comes from analysis of the likely effects when the Act is enforced in situations that do not closely fit the law's fundamental concerns described in my response to Question 2.

Time after time, enforcement of the Act has occurred in situations where neither buyers nor sellers have market power (in fact, existence of market power has rarely been the focus of investigation or a prerequisite to issuing a complaint). In such cases it is likely that the challenged price differences were made to meet competition or reflect cost differences. But the substantial difficulties that have been placed before respondents in using the defenses, particularly cost justification, have meant that sellers who might otherwise be willing to lower prices to particular buyers because of lower costs do not do so because of fear of running afoul of the law. They find it hard to defend themselves except at great expense and substantial risk of failure. Frequently, the sellers who are deterred from defending themselves are smaller firms. They are harmed, as would be consumers. I do not believe these effects are sufficiently justified by the fact that the beneficiaries may in certain cases be smaller buyers.

In response to the difficulty in mounting an effective defense, sellers may instead respond by increasing the degree to which their products are differentiated, since the Act's prohibitions apply only to products of like grade and quality. This added differentiation is artificial, in the sense that it would not occur in the absence of the risk imposed by the Robinson-Patman Act. This is costly to consumers and to sellers.

Sellers, particularly smaller sellers, may also respond by increasing the degree to which they specialize in supplying a particular class of buyers, each of whom can then be charged the same price. The same degree of specialization would probably not occur without the risk imposed by Robinson-Patman. This also is harmful to the seller and to consumers.

All of these effects are difficult to observe empirically and frankly, I do not believe it has yet been done. I do think that Adelman's book, A&P: Study in Price-Cost Behavior and Public Policy points out many of the problems in the enforcement of Robinson-Patman. It indicates quite clearly how consumers and small firms may be harmed by unfocused enforcement of the Act.

Question 4: Do you plan to develop guidelines or criteria which will serve as the basis for the Commission's Robinson-Patman enforcement program? If so, please describe what the guidelines or criteria are. Please include in your answer what you believe the FTC's Robinson-Patman enforcement objectives should be.

ANSWER: I think it would be useful to develop guidelines or case selection criteria for Robinson-Patman Act cases so that enforcement initiatives reflect the exercise of market power by buyers or sellers. Toward this end a group of attorneys and economists working through the Bureau of Competition Planning Office began several months ago an analysis of the feasibility of establishing enforcement criteria. It is too soon to determine the specifics of any criteria, but an emphasis on market power would insure that the Act's basic goals are more likely to be met, without imposing high costs on business firms, particularly smaller firms so often challenged in the past and the least able to defend themselves. My enforcement objectives have been set out in response to Question 2.

Question 5: The Robinson-Patman Act has consistently been criticized as being adverse to competition and inconsistent with the purposes of antitrust laws. Are you aware of any probative body of evidence that Robinson-Patman, through its history, has produced a measurable increase in the cost of living or price levels, or that it has rigidified price structures, or that it has deprived consumers of the benefits of efficient distribution, or that it has perpetuated inefficiency, or unduly high profits? If you are aware of any such data, please identify it.

ANSWER: I am not aware of strong empirical evidence of the effects listed in the question. I am also not aware of evidence that the listed effects have moved in the opposite direction. Application of economic theory to most past cases would imply that they did not.

Question 6: In your view, does the Robinson-Patman Act incorporate social, as opposed to economic values? [illegible] so, will those values be preserved if Robinson-Patman is rep[illegible] either a *de facto* or on an actual basis? If you be[illegible] will, please explain how such values are preserved in o[illegible]er antitrust laws or in any other laws. If you believe that s[illegible] social values cannot be preserved without some form of additional Robinson-Patman type legislation, how would you amend the Robinson-Patman Act to preserve such values?

ANSWER: In my view the Robinson-Patman Act incorporates social and economic goals that do not necessarily conflict. I believe that more careful case selection would facilitate the attainment of both.

I have at present no specific suggestions for amending the Act. I would, however, like to investigate whether under the existing confines of the law and court decisions new life could be breathed into the "except for services rendered" clause in Section 2(c) and whether, in examining the question of proportionally equal terms under Sections 2(d) and (e), differences in costs incurred or benefits received per dollar spent by sellers on different classes or sizes of buyers could be better accounted for. I would also like to examine whether the rigors of cost justification could be diminished, particularly in situations where the power of the buyer or seller is not substantial (as this is normally defined under the antitrust laws).

Question 7: If it is your intention to continue the FTC's role as the government's Robinson-Patman prosecutor, do you believe that its legislative mandate is being effectively applied? That is, do you see in the Commission's past Robinson-Patman enforcement program a preoccupation with small respondents? If so, how do you propose to redirect your enforcement activities? If not, please identify those Commission enforcement activities which you believe meaningfully advanced its legislative mandate.

ANSWER: I believe that the legislative mandate of the Robinson-Patman Act will be effectively applied if the Commission attacks unjustified discrimination resulting from the exercise of market power. Past Commission enforcement has often reflected a preoccupation with small respondents and technical violations of the Act's strict terms rather than conduct which the Act fundamentally was designed to deter. That is, challenges have been made against both buyers and sellers who granted or received lower prices but not in the exercise of market power. This sort of enforcement does not enhance competition, but does raise prices to consumers. In addition, where a single firm's practices were challenged, especially if a small firm, the respondent was placed at a competitive disadvantage relative to other firms in the industry engaged in similar practices. I would propose to redirect our enforcement activities to firms which appear to have significant market power.

Question 8: Do you think the Commission's considerable investigative and rulemaking powers should be used, not to conduct theoretical studies of the Robinson-Patman Act that should be left to the academicians, but to ferret out the types of cases that would add meaning to the Commission formal enforcement program and therefore create a climate in which business will conclude that it is in its best interest not to risk Commission attack? Now that the Commission has freed itself to some extent from the burdens of the massive proceedings which were on-going prior to your appointment as Chairman, don't you think that some of these resources could be effectively utilized in an effective Robinson-Patman enforcement program?

ANSWER: I think that it is incumbent upon the Commission as federal prosecutor of the Robinson-Patman Act to set standards and to examine its enforcement efforts very carefully. This is necessary in order to have confidence that the manner of enforcement results in a net gain to competition and society rather than adverse effects. Because this is a fundamental obligation of any prosecutor - not merely a Robinson-Patman enforcer - I would not wish wholly to abdicate that responsibility to academicians not associated with the Commission.

The closing or completion of a number of resource-intensive matters in litigation has permitted the Commission to undergo budget reductions without sacrificing significant Commission objectives. Effective Robinson-Patman enforcement is one of those objectives.

Question 9: Some years ago, FTC Commissioner MacIntyre urged the Commission to adopt what he called a "preinvestigative conference procedure" in which businessmen would be put on notice that the Commission intended to investigate a questioned practice and would be given an opportunity voluntarily to comply with the law and thus to avoid investigation and litigation. Would not some variation on this procedure now be useful in Robinson-Patman matters -- perhaps even the establishment of a formal conciliation service? Would some form of Robinson-Patman ombudsman be useful in channeling the grievances of small, disadvantaged businessmen through to effective relief?

ANSWER: I agree very strongly that non-confrontational resolution of disputes is often in society's interest in that it may avoid the expenditure of considerable resources - both government resources in the prosecution of a matter and private resources in defending the matter. The general principle would, of course, apply beyond Robinson-Patman issues. I have not, heretofore, examined whether certain procedures such as those described in this question might efficiently be employed in Commission law enforcement areas. It is, however, a suggestion worth considering.

Several years ago the Bureau of Competition publicly designated the Assistant Director for Evaluation as a small business liaison or contact person. At that time, the Bureau published a guide on how to channel a Robinson-Patman complaint to the Commission. I have continued in effect these procedures in order to facilitate the provision of information to the small business community and the receipt of complaints or problems from the small businessman. In addition, I and the Director of the Bureau of Competition have met with representatives of the small business community for the purpose of exploring their interests in antitrust enforcement and identifying our mutual concerns.

Question 10: The Commission might, for example, undertake as it has often promised to do in the past, a genuine compliance sweep, designed to let old respondents prove their rehabilitation. This could be done by inviting respondents -- say to orders entered more than 10 years ago -- to show cause through submission of a current report of compliance, why their orders should not be vacated. Wouldn't this have the added incidental benefit of creating a meaningful record of the effects and the impact on competition that Robinson-Patman enforcement actually has had?

ANSWER: I have taken several initiatives in the area of antitrust compliance. First, Bureau of Competition attorneys have reviewed all Clayton Act orders issued prior to passage of the Finality Act of 1959 (15 U.S.C. §21(1970)). Before passage of the Finality Act, the Commission was forced to enter an order for violation of the Clayton Act, obtain a court order commanding adherence to the Commission's order by showing its violation, and then establish yet another violation of the Court's order to get relief. The Finality Act remedied this cumbersome procedure by providing that Commission Clayton Act orders become effective 60 days after service unless appealed. There remain, nonetheless, approximately 500 pre-Finality Act orders which are virtually unenforceable. The Commission is considering a Bureau staff recommendation that all unenforced Clayton Act orders issued before the passage of the Finality Act be vacated. Most of these orders are under the Robinson-Patman Act. Second, Bureau attorneys have identified all orders imposing merger moratoria longer than ten years. These orders are being examined on the ground that prohibitions on future mergers for a period longer than ten years may be unnecessary to preserve competition and may impose significant costs on companies under these orders. Additional compliance reviews are being planned, and all such efforts together may help in providing us with a better understanding of the effects of Commission orders.

RESALE PRICE MAINTENANCE

Question 1: You have specifically criticized the FTC's enforcement activity against resale price maintenance. The Transition Team Report said, "...absent cartelization of either the manufacturer or dealer levels, there is nothing anticonsumer about the use of retail price maintenance." Have you considered the effect of product differentiation on the competitive picture? In cases where product differentiation has created strong product loyalty for a particular brand among a significant subgroup of consumers, won't intrabrand competition become especially important since interbrand competition won't fully protect those consumers? What is your view of RPM in that circumstance?

ANSWER: RPM does not eliminate all intrabrand competition. Even in the sale of a highly differentiated product, RPM eliminates intrabrand price competition, but RPM also may create incentives for resellers to compete for additional sales through various non-price forms of intrabrand competition, such as the provision of point-of-sale services, recommendations, demonstrations, etc.

In the absence of collusion at either the manufacturer or reseller level, it is not obvious why one would expect a manufacturer to impose RPM except to increase the sales of his product. Since we can assume that RPM will typically increase the price of the product to consumers compared to the price which would prevail without RPM, a manufacturer would not ordinarily impose RPM unless the response of consumers was expected to be on balance favorable. That is, the manufacturer's sales are expected to increase because consumers' tendency to purchase less, due to the somewhat higher price which accompanies RPM, is expected to be more than offset by the increased sales in response to the RPM induced reseller sales efforts. If the manufacturer's sales increase following the imposition of RPM, it seems to me that the effect on consumers is on balance beneficial as judged by the fact that consumers have increased their purchases.

If a manufacturer has market power in the sense of owning the property rights to a highly differentiated branded product with a substantial market share, I find it difficult to understand why the manufacturer would impose RPM unless the consumer response was expected to be favorable. The manufacturer could raise consumer prices without RPM, if that were his only objective, merely by raising his price to the resellers. RPM is not needed to accomplish this.

Therefore, without collusion or the specification of a much more complicated factual situation than posed in your question, RPM is likely to be imposed only when the manufacturer believes that sales will increase as a result of RPM. If the manufacturer is correct, consumers will benefit as measured by the consumer response to the RPM. If the manufacturer is not correct, his self interest would be served by removing the RPM, and I would expect that to happen.

Question 2: Should not independent distributors, who are closest to the retail market, remain free to resell at prices established by their own individual responses to the competitive conditions which they face in their market?

ANSWER: In most circumstances I would argue that social welfare will be maximized by the unfettered forces of the free market. However, in situations where market failures or externalities exist, for example, when some resellers can take advantage of (or "free-ride" upon) the services, sales efforts, or reputations of other resellers without compensating the latter for the costs incurred, the unfettered market will tend to underprovide valuable services. Under such circumstances both sellers and consumers can benefit from certain market restrictions which prevent such free-riding. RPM may be one such restriction, although it is not the only one.

As in my answer to the previous question, in the absence of collusion or other market failures (patents, licensing restrictions upon entry, etc.), it seems to me very likely that firms will attempt to impose restrictions upon resellers of their products unless they expect increased sales as a result. This is not the output restricting behavior which is characteristic of the anticompetitive response by a seller facing a market failure, i.e., the potential to free-ride. Manufacturers with market power do not need RPM merely to elevate their prices to final consumers. Indeed, in most circumstances in the absence of collusion or free-rider situations I would not expect to see manufacturers impose RPM at all.

Question 3: The courts have remained absolutely firm that RPM is a per se violation of Section 1 of the Sherman Act. This was reiterated by the Supreme Court recently in the Midcal Aluminum case. Certainly, the overwhelming weight of authority is to that effect. Assuming this to be the case, do you think it is wise or proper for a chief law enforcement official to publically imply that his agency will not enforce an established law?

ANSWER: I do not think it wise or appropriate for a chief law enforcement official to state or imply that he will not enforce clearly established law. Nor have I ever done so. The law concerning resale price maintenance - whether Section 1 or Section 5 - is such that reasonable judges or prosecutors can and do with regularity disagree as to its application. By the same token, a chief law enforcement official must necessarily exercise prosecutorial discretion - that is the often-difficult judgment whether or not it is both wise and proper to apply sound economic and legal analysis in determining that judgment call. When that analysis indicates that a manufacturer's pricing policies may be on balance enhancing competition rather than suppressing it, mindless adherence to a per se analysis seems uncalled for. I believe that a law enforcement official has an obligation to examine substance and not just the form.

Question 4: If you disagree with the law, would not the proper course be to petition the Congress for a change in the law?

ANSWER: The Sherman and Federal Trade Commission Acts are broad and undefined as written. Definition and meaning come through judicial and Commission interpretation and application. It is not suprising that I disagree with some of the interpretations as to which conduct should be found to be unlawful resale price maintenance. If I had a wholesale disagreement with the laws I was sworn to uphold, I would likely seek legislative change. Where I find the law's application sometimes achieves perverse results, I would urge that the people applying the law change its application insofar as the law allows, consistent with the will of Congress.

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United States Senate
COMMITTEE ON SMALL BUSINESS
WASHINGTON, D.C. 20510

December 22, 1981

Honorable James Miller
Chairman
Federal Trade Commission
6th and Pennsylvania Ave. N.W.
Washington, D.C. 20580

Dear Mr. Chairman:

Following up on the hearing on antitrust and its impact on small business held by the Subcommittee on Productivity and Competition on December 1, 1981, enclosed are questions for the record submitted by Democratic members of the Committee. Your prompt response would be appreciated.

Sincerely,

Sam Nunn

c.c. Chairman Weicker

FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

OFFICE OF
THE CHAIRMAN

March 4, 1982

The Honorable Sam Nunn
Committee on Small Business
United States Senate
Washington, D.C. 20510

Dear Senator Nunn:

Thank you for your letter requesting my response to follow-up questions posed by members of the Committee as a result of my testimony before the Subcommittee on Productivity and Competition on December 1, 1981.

Enclosed please find my response to each of the questions you have submitted. Should you need further information on this subject, please feel free to contact me or my staff.

Sincerely yours,

James C. Miller III
Chairman

Enclosure

1. You were the Team Captain of the Reagan-Bush transition team. The transition team reports seem to blur the role of the FTC as a law enforcement agency versus an economic policy agency. What direction do you hope to give the Commission in these areas?

ANSWER: The FTC is really both a law enforcement agency and an economic agency. It is of course a law enforcement agency, but to carry out its work in the public interest it must rely heavily on economic analysis to guide resource allocation, to determine whether a violation of law has occured, and to evaluate the need for and desirability of enforcement action.

Economists now actively participate in the evaluation committee meetings which consider the merits of new matters coming before the Commission. The advice of economists will be useful in directing the Commission's resources to those law enforcement areas where consumers can expect to benefit most.

The antitrust and economic policy roles of the FTC have not been blurred. Rather, there is a clear understanding of the important role economic analysis should play to assist the Commission in carrying out its law enforcement duties.

2. Will you continue the long-standing Commission practice of designating a small business liaison person within the Bureau of Competition to be an initial contact person for small businesses and their trade associations?

ANSWER: Yes, I have continued in effect the prior designation of the Assistant Director for Evaluation as the principal contact person within the Bureau of Competition. In recognition of the importance to the American economy of small business, I have met on four separate occasions with representatives of, in total, thirteen small business organizations. In addition, the Director of the Bureau of Competition has held meetings with small business groups representing a number of trade associations, including the Small Business Legislative Council and the National Federation of Independent Businesses. Although the Assistant Director for Evaluation will remain as the initial contact person, I intend that many small business issues will receive my personal attention.

Robinson-Patman Act

3. The small business community views enforcement of the Robinson-Patman Act (which prohibits price discrimination by sellers) as crucial to their survival. The FTC transition team report noted that:

> Small Business is extraordinarily important to our economy. But even judicious selection of Robinson-Patman cases would constitute an inefficient means of supporting this segment of the economy.

At your first press conference on October 26, 1981, you said that much of the "R-P" Act enforcement has been "misdirected". You also said, "If you will look at the cases that have been brought by the FTC under the Robinson-Patman Act, as a whole they have not benefitted small business." Your prepared statement today (p. 9) restates this view.

What type of "R-P" enforcement, if any, can the Commission undertake to benefit, or better protect, small business?

ANSWER: There are some circumstances in which economic theory predicts that price discrimination will have anticompetitive results. As I have stated, I do not believe, however, that many of the cases that have been brought in the past by the FTC have benefitted either small business or economic efficiency. In particular, many of these cases and investigations have targeted firms that are small in absolute size, do not possess significant market power, or both.

The Commission should apply the Robinson-Patman Act to those examples of price discrimination by companies that are attempting to extend or exploit significant market power. Price discrimination can sometimes be used for the purpose and with the effect of driving an equally efficient competitor out of the market, assuming the discriminating firm is planning to recoup short term losses by longer term monopoly profits. Applying the Robinson-Patman Act to such cases can benefit both small business and the interest of economic efficiency.

4. Do you favor continuing to collect and utilize the line of business reports (particularly for larger companies) to assist you in your economic analyses of business aggregation and merger policy?

ANSWER: I will support the collection of additional rounds of line of business (LB) reports from large companies if I am convinced that the benefits of doing so outweigh the costs. The Commission in the near future expects to consider an analysis of both benefits and costs of collecting LB data for years after 1977. It will then decide on how to proceed with the LB program. One potential benefit is in evaluating both individual mergers and in assessing broad merger policy. Commission staff are currently using the recently published aggregated data for 1974 and 1975 and several research reports based on the LB data to address various aspects of merger analysis. The aggregate data for 1976 and 1977 should be released soon, along with additional research reports on merger-related issues. I expect the staff to continue to use these resources in dealing with merger questions.

Distributional Restraints

5. At your first press conference on October 26, you said that under certain circumstances, distributional restraints can be conducive to economic efficiency, can benefit consumers, and should not be challenged.

Would you elaborate on those "certain circumstances" when, in your view, distributional restraints might not be anticompetitive?

Have you or any bureau directors given any instructions or timetables to the Commission staff on pursuing retail price maintenance investigations?

ANSWER: Whether a particular instance of a distributional restraint is anticompetitive depends on a large number of factors. Although all distributional restraints tend to limit intrabrand competition (competition among dealers in the same brand), any judgment about the overall effects of a restraint must give weight to the state of interbrand competition (competition among different brands) as well. Thus, one circumstance in which a restraint might not be anticompetitive is when intrabrand competition is extremely vigorous; since consumers have a wide variety of choices and market forces will reduce prices to competitive levels, the restraint will have little or no effect on competition.

In other situations, the effect of a restraint in promoting interbrand competition may greatly outweigh the diminution of intrabrand competition. This could apply in the case of a new entrant or small manufacturer, which may need some type of vertical restraint to help establish a dealer network, or achieve consumer recognition of a new product line. Occasionally a restraint may be helpful in encouraging dealers to provide necessary services to consumers without fear that their efforts will be undercut by other dealers that take advantage of a "free-ride." Other types of competitive justifications are also possible.

Neither I nor the Bureau Director has given instructions or timetables to the staff on resale price maintenance investigations.

Staff Resources

6. How many investigations has the Commission staff initiated this year in the areas of:

vertical restraint;
resale price maintenance;
territorial restraint on distributors; and
predatory pricing?

Of the investigations initiated, have any proposed complaint recommendations been submitted to the Commission?

ANSWER: Often when an investigation is opened there may be a number of allegations involved. In analyzing matters initiated during calender year 1981, we find the following:

24 investigations which included an allegation of vertical restraints (excluding resale price maintenance and territorial restrictions);

24 investigations alleging resale price maintenance as a violation;

1 investigation alleging territorial restraints as a violation;

10 investigations which included predatory pricing as an alleged violation.

Of these investigations, none has yet resulted in a complaint recommendation being submitted to the Commission. Customarily, it takes longer than one year from initiation of an investigation to submission to the Commission of a complaint or settlement in the matter.

I also would envision the Headquarters Office here in Washington playing a larger role than in the past, particularly by the Bureau Directors exerting tighter quality control and closer resource supervision over investigations contemplated by the staff of the Regional Offices. To my mind, this is just sound management.

Mobil/Marathon

7. Small business resellers of Marathon refined petroleum products supply a significant portion of the total gasoline market in four states. Both branded and unbranded marketers could be eliminated if the Mobil-Marathon merger is consummated. Mobil documents reveal a firm policy against private brand marketing; branded jobbers and distributors could also be eliminated because Mobil jobbers already exist in most of the local markets currently served by branded jobbers.

Has the Commission's staff analyzed the potential impact on regional or national competition if the merger were consummated?

ANSWER: Yes. The Commission's attorneys and economists analyzed the potential impact of the proposed merger on both national and regional competition. Based on such analysis, the Commission concluded that the merger may tend to lessen competition in localized markets. The relevant market within which the Commission determined the existence of anticompetitive potential was the distribution at wholesale in various mid-western markets that are served by petroleum product terminals or clusters of terminals that dispense gasoline, middle distillates, No. 1 fuel oil (kerosene), and No. 2 fuel oil (home heating fuel and diesel fuel). The Commission adopted the wholesale market definition precisely because it had focused on the point raised in the question; namely, that Mobil's wholesale practices were quite different from Marathon's with regard to sale to independent resellers.

8. Marathon offers its branded gasoline distributors programs which enable them to extend 90 day credit to local businesses and industries. Farmers are able to obtain credit calling for payment only two or three times a year, and at interest rates which are only a fraction of that charged by lending institutions. This is invaluable to the small business gasoline marketer and to his small business customers. Mobil has no such programs.

Is this credit program a valid factor for consideration by the Commission in reviewing the proposed merger?

ANSWER: Although the differences in the two firms' credit programs were not specifically considered in evaluating the legality of the merger, such qualitative differences in the business approaches of acquiring and acquired firms have obvious import in evaluating a proposed merger or acquisition. See, e.g., Kaiser Aluminum and Chemical Corp. v. FTC, 1981-1 CCH Trade Cas. ¶64,149 at 76,893 (7th Cir. 1981).

Indeed, in its preliminary injunction papers, the Commission alleged important qualitative differences between the two firms, noting that Marathon had been an "aggressive competitor in the pricing of petroleum products" while Mobil had not; and, that Marathon had traditionally sold most of its gasoline to "independent wholesale or retail gasoline marketers", whereas Mobil had traditionally declined to supply independent marketers.

The elimination of a competitor offering a unique service to customers within a particular line of commerce is a matter of entirely valid concern under Section 7 of the Clayton Act, which proscribes acquisitions "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition."

On October 30, 1981, Mobil Corporation offered to purchase up to 40,000,000 of the approximately 59,000,000 outstanding shares of Marathon Oil Company at $85 per share. The stated purpose of the offer, in Mobil's words, is "to acquire control of the Company (Marathon), as the first step in acquiring the entire interest of the Company".

Mobil competes with Marathon in virtually every phase of its operations, from oil and gas exploration and production, to transportation, refining and marketing.

Listed below are comparison of the positions of Marathon and Mobil in the functional components of the two companies.

General Rank of Size

	Mobil Rank	Marathon Rank	Combined Rank
U.S. Motor Gasoline Sales, 1980	4	12	1
Crude Oil Delivered Over its U.S. Crude Oil Pipelines, 1980	10	6	1
U.S. Total Liquid Pipeline Mileage, 1980	2	15	1
Refined Liquid Petroleum Delivered Over its U.S. Product Pipelines, 1980	14	5	2
U.S. Refining Capacity, 1980	7	9	2
U.S. Crude Oil, Condensate and Natural Gas Liquids Net Production, 1980	8	14	4
U.S. Natural Gas Net Production, 1980	4	21	3
Proved and Developed U.S. Crude Oil and Condensate Liquid Reserves, Dec. 31, 1980	10	12	5
Proved and Developed U.S. Natural Gas			

1. Small business resellers of Marathon refined petroleum products supply a significant portion of the total gasoline market in four states. Both branded and unbranded marketers could be eliminated if the Mobil-Marathon merger is consumated. Mobil documents reveal a firm policy against private brand marketing; branded jobbers and distributors could also be eliminated because Mobil jobbers already exists in most of the local markets currently served by branded jobbers.

> (a) Has the Commission's staff analyzed the potential impact on regional or national competition if the merger were consumated?
>
> (b) Please provide all written staff recommendations made to the Director of the Bureau of Competition concerning the potential merger, including the request for additional information from Mobil under the prenotification requirements of the Hart-Scott-Rodino Antitrust Improvements Act, and
>
> (c) Did the Bureau of Competition staff recommend any action concerning the Mobil-Marathon merger that were not taken by the Commission?

Marathon offers its branded gasoline Distributors programs which enable them to extend 90 day credit to local businesses and industries. Farmers are able to obtain credit calling for payment only two or three times a year, and at interest rates which are only a fraction of that charged by lending institutions. This is invaluable to the small business gasoline marketer and to his small business customers. Mobil has no such programs.

Is this credit program a valid factor for consideration by the Commission in reviewing the proposed merger?

LOWELL WEICKER, JR., CONN., CHAIRMAN

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United States Senate
COMMITTEE ON SMALL BUSINESS
WASHINGTON, D.C. 20510

March 12, 1982

Honorable James C. Miller
Chairman
Federal Trade Commission
6th and Pennsylvania Avenue, N. W.
Washington, D. C. 20580

Dear Mr. Chairman:

Following up on my letter to you of February 11, 1982, regarding the Committee's December hearing on Antitrust Policy, I am enclosing, on behalf of Senator Nunn, an additional question for the record. I would appreciate a response to the question.

Thank you for your attention to this matter.

Sincerely,

LOWELL WEICKER, Jr.
Chairman

Enclosure

FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

OF THE CHAIRMAN

April 9, 1982

The Honorable Lowell Weicker, Jr.
Chairman
Committee on Small Business
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for your letter on behalf of the Senate Committee on Small Business dated March 12, 1982 requesting access to certain documents in the Mobil/Marathon Oil investigation. You also enclosed questions sent to the Commission earlier by Senator Nunn in a letter dated December 22, 1981. Answers to these questions were initially provided to Senator Nunn by letters of March 4, 1982 and April 7, 1982. Copies of those letters are enclosed.

The Commission has determined to grant your March 12th request as it constitutes an official request of a congressional committee. Because, for the reasons discussed below, the material responsive to this request would not be available to the public under the Freedom of Information Act ("FOIA"), and because the companies that submitted the information consider it confidential, the Commission requests that no further disclosure of the material be made.

Responsive documents include material which was submitted pursuant to the Hart-Scott-Rodino Premerger Notification Act and which the Commission is prohibited from disclosing to the public by virtue of Section 7A(h) of the Clayton Act, 15 U.S.C. § 18a(h). This material is therefore exempt from mandatory public disclosure under Exemption 3 of the FOIA, 5 U.S.C. § 552(b)(3). In addition, some responsive documents contain material which was obtained by compulsory process or in lieu of compulsory process in an investigation a purpose of which was to determine whether a law violation has occurred. Such material is specifically exempted by law from mandatory public disclosure. Sections 21(b) and 21(f) of the FTC Act, as amended, 15 U.S.C. § 57b-2(b) and 2(f) (Supp. IV 1980); FOIA Exemptions 3(A) and 3(B), 5 U.S.C. § 552(b)(3)(A) and (3)(B). *Dairymen, Inc.* v. *FTC*, CCH 1980-2 Trade Cas. ¶ 63,479 (D.D.C. 1980). See Section 4.10(d) of the Commission's Rules of Practice, 16 C.F.R. § 4.10(d), as amended, 46 Fed. Reg. 26284, 26292 (May 12, 1981).

This material may also contain commercial or financial information which is privileged or confidential, the public disclosure of which could cause serious competitive harm to the companies that submitted it. Information of this kind is separately exempt from mandatory disclosure. Section 6(f) of the FTC Act, as amended, 15 U.S.C. § 46(f) (Supp. IV 1980); FOIA Exemption 3(A). This information is also exempt under FOIA Exemption 4. National Parks and Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974).

Finally, because the company-submitted information incorporated into the Commission's internal memoranda was designated confidential by the submitting companies, under the provisions of the confidentiality agreement in the Commission's Exxon investigation, Docket 8934, and/or Section 21(d)(1)(A) of the FTC Act, as amended, 15 U.S.C. § 57b-2(d)(1)(A) (Supp. IV 1980), the Commission must give prompt notice to those companies of the committee's request. This notice has been given. See also Rules 4.10 and 4.11 of the Commission's Rules of Practice, as recently amended, 46 Fed. Reg. 26284, 26292 (May 12, 1981).

Copies of the letters to Senator Nunn are enclosed. The committee may arrange for access to the responsive Mobil documents by calling Marc G. Schildkraut, Esquire, at 724-1424.

By direction of the Commission.

James C. Miller III
Chairman

Enclosures

FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

OFFICE OF
THE CHAIRMAN

April 7, 1982

The Honorable Sam Nunn
Ranking Minority Member
Committee on Small Business
United States Senate
Washington, DC 20510

Dear Senator Nunn:

It has just come to my attention that my letter of March 5, 1982, responding to your request of January 5, 1982, contains an omission. My response to question 1(c), dealing with the proposed acquisition of Marathon Oil Company by Mobil, was inadvertently deleted and is herewith attached. I sincerely apologize for any inconvenience this may have caused you.

Sincerely yours,

James C. Miller III
Chairman

Attachment

MOBIL/MARATHON

1 (c). Did the Bureau of Competition staff recommend any action concerning the Mobil-Marathon merger that were not taken by the Commission?

ANSWER: The staff of the Bureau of Competition recommended to the Commission that a preliminary injunction action be undertaken to prevent the acquisition, under Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. Section 53(b). The staff had differing views, however, on whether the injunction should prevent the merger pending issuance of an administrative complaint by the FTC, or should prevent the merger of the companies until a plan could be examined and approved by a federal district court that would eliminate competitive overlaps between the two concerns. On December 8, 1981, the Commission directed its staff to bring suit under Section 13(b) to enjoin the acquisition "for the pendency of administrative proceedings" of any of Marathon's assets "unless and until such time" there could be a court approved transaction, "which would result in an immediate divestiture of the transportation, storage and marketing assets of Marathon, in such a manner as to maintain the divested entity in viable competition in the relevant markets, and which divestiture would not violate any of the antitrust laws of the United States."

Senator GORTON. We will now hear from Mr. Baxter.

Mr. Baxter, we welcome you to the committee. We will be happy to hear from you in a formal statement.

STATEMENT OF WILLIAM F. BAXTER, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. BAXTER. Thank you, Mr. Chairman.

I have prepared a fairly long statement. I doubt that you would like to hear it all again. I will summarize it briefly.

Senator GORTON. Thank you. The whole statement will be included in the record.

Mr. BAXTER. Thank you, Mr. Chairman.

I am here today primarily to talk about the antitrust policy of this administration and its effect on small business. The antitrust policies are a matter of great importance to small business, primarily because their central function is to preserve a system of free and competitive markets, which is the very economic context in which small business will function best.

Your invitation to me to come and testify made a number of references to merger policy, and perhaps I should start there. The statutory framework for looking at merger problems is either section 1 of the Sherman Act or section 7 of the Clayton Act. One speaks of agreements in unreasonable restraint of trade; the other speaks of acquisitions which may substantially lessen competition.

In both cases the language is quite general, requiring a good deal of interpretation, but I find no quarrel with the language in either case. I take it the language in both instances incorporates what I would call a dynamic standard. It refers at any particular point in time to our best understanding at that point in time of what competition means, and that is essentially an economic question.

The course of statutory interpretation of this merger language is complicated, confusing, often confused. I will not go through that history in any detail but we had the multifaceted analysis that the Supreme Court first promulgated in *Brown Shoe,* rapidly followed by the progeny of the *Philadelphia Bank* case where the courts were focusing almost entirely upon the arithmetic sum of the two market shares of the merged companies. Passing briefly to a period represented by the last few years, it seems to me the courts have been doing a far better job with the merger question, becoming more and more realistic and sophisticated in their assessment of the market conditions that bear on the merger.

The Department's own enforcement posture has experienced the same improvement in sophistication. The 1968 guidelines, however, captured an earlier and—from the standpoint of today—very primitive and simplistic approach to mergers, and did not keep up either with the movement in the courts or of the Department's own enforcement policy. As you know, we are devoting substantial efforts today to reworking those 1968 guidelines. Those guidelines, incidentally, when they were promulgated explicitly contemplated that they would be updated from time to time, but 13 years has now passed and that has not happened.

A sensible, predictable, and fairly flexible merger policy is, I think, very important to small business. A system of rigid per se rules can be very, very harmful in those contexts.

The mergers that get newspaper headlines of course are the very large ones but the overwhelming preponderance of merger activity takes place among small firms. Indeed, most small entrepreneurial-type firms come to some point in their development when, for a number of reasons, they really want to cash out and be acquired by a somewhat larger firm.

That may occur for a variety of reasons. If it does not occur for any other reason, it is likely to occur when the original entrepreneur or entrepreneurs begin to approach retirement age. They are sitting on stock which is extremely difficult to value for estate tax purposes, and their estate tax lawyers will tell them that it is absolutely essential that they change the composition of their portfolio into securities whose values may be more definitely ascertained. A stock-for-stock acquisition with a publicly-traded company is the standard solution to that particular problem.

Small firms, by and large, are highly innovative. They are likely to have been founded around a good idea, an innovation, a patent by the entrepreneur. They will develop a product; they will make a market introduction. If it is highly successful, our experience is that small firms as often as not are not the most efficient mass manufacturers of that product, so that there will often be a strong incentive for merger at this point in time so that a firm with more manufacturing experience can step into the picture, take over this product, and produce it at a lower cost to consumers.

Then of course there are the rescue problems, the small firms that do not go quite so well, and again there will be a need for an infusion of finance, of new ideas. Again, merger is often the solution.

A second topic I would touch on just briefly is the whole question of vertical restraints. Here again, at least one and often both of the companies to the kinds of agreements that I have in mind when I use the term "vertical restraints" will be small businesses. In this context, we are referring again to section 1 of the Sherman Act but also to section 3 of the Clayton Act. Again, the language in section 3 is the same as in section 7, where the effect may be substantially to lessen competition in an identifiable line of commerce.

Again in this context, the courts over the years and the enforcement authorities over the years have, in my view, been much, much too quick to jump to very, very simplistic per se rules that made it impossible to use these arrangements. Again in this context, the courts have been backing off, acquiring more sophistication, a better understanding of what is involved here. The very foolish opinion of the Supreme Court in the *Schwinn* decision some years ago was happily reversed by the Supreme Court itself in its much more insightful opinion in *GTE Sylvania*. In a variety of other contexts, the courts have been backing away from the simplistic per se rules that used to characterize this area. That is highly desirable.

These vertical contractual arrangements are used for a variety of purposes. They are often used to prevent free riding by one distributor on point-of-sale services and information afforded by other distributors. Permitting the appropriate use of these devices not only enhances the richness of the product mix that is available for consumers but also expands and enlarges the number of specialized retail outlets that tend to be associated with the distribution process.

Where this type of use is not permitted, products tend to be forced into a narrow and more homogeneous band. Competition tends to be confined solely to price competition, and as a generalization—too broad, as most generalizations are—the retail scene tends to become more and more dominated by the large discount-type operation with its strong tendency away from the specialized retail outlet. Therefore, again in this context it seems to me that our enforcement policies toward this question of vertical contracts are entirely beneficial to the small business community.

I would point out that the large manufacturers can always accomplish these results. They can always block this free-riding phenomenon by moving to a system of full vertical integration, selling their product through owned outlets. Another consequence of the severe per se attitude of the Supreme Court during the sixties toward vertical arrangements was the creation of an incentive toward more and more extensive full vertical integration by manufacturing outlets, again reducing the range of opportunity for small business in the distribution system.

The third and in some ways perhaps the least well-known area which I would point to this morning is the area of intellectual property. I have in mind patents, copyrights, trademarks, trade secrets. Again, small business is a disproportionate contributor in these areas. A very large fraction of innovation comes out of smaller enterprises.

Historically, the courts have interpreted the antitrust laws to put very, very extreme restrictions on the ability of companies which hold patents or copyrights or trademarks to license and exploit the intellectual property which those forms of intellectual property protection are intended to convey. This I think is particularly hard on small enterprises.

The statutes that we are talking about here, again like the contractual vertical restrictions I was discussing a moment ago, are primarily intended to protect those who have made investments in finding new information from free rider effects, and if those incentives are to be preserved, then it must be possible effectively to exploit the technologies once they have been developed.

In general, I would say our antitrust policy toward these kinds of intellectual properties is that any sort of licensing arrangements that the owners wish to make are basically all right unless those arrangements tend to suppress competition between the patented technology or the copyrighted information and alternative technologies. As long as it is simply an exploitation of the idea that was unique to this company, it ought to be permitted.

In saying that, I have in mind such things as the use of tie-in sales for metering intensity of use as a royalty licensing technique; other bundling practices that are intended to get the licensee, to induce the licensee to use the patented technology and other inputs in his production process in more nearly optimum proportions to one another, which will be thwarted if those arrangements are not permitted.

I have in mind the extreme difficulty the courts have created for the holder of a process patent by insisting that only the process can be licensed and that royalties cannot be based on the product that is the output of the process; and a series of other very, very rigid and thoughtless antitrust prohibitions.

I would refer briefly to the problem of joint ventures. Again, the phenomenon of the joint venture is one that is disproportionately useful to the small business enterprise. It is frequently the case in various lines of commerce that economies of scale in many parts of an operation do not dictate the existence of very large units, but there may be some one particular aspect of the enterprise where there are substantial scale economies.

It is often possible for a group of companies to retain their individuality and perform that one function through a joint venture, and thereby attain the scale economies with respect to that one function, without all merging into a single company. If the law takes an excessively hostile view toward joint ventures, then the whole industry will be forced into units which are sufficiently large to exploit the scale economies that exist only with respect to that one function.

I have in mind particularly the research problem where the scale economies associated with research will often be far greater than the scale economies which are associated with the manufacturing or service facilities that that research endeavor will serve. It certainly should be possible for a group of companies to get together and form a joint venture for the purpose of doing their research, perhaps for the purpose of doing overseas shipments for export purposes, or one can think of other possibilities.

Again, with respect to joint ventures as with respect to mergers, it seems to us the only appropriate way is to look at them in their individual market settings, to ask what fractions of the markets are preempted by the companies forming the joint venture, how much competition is left on the outside, their actual potential for lessening competition in the individual circumstance, and a tendency very much away from encouraging the invocation of per se rules which knock down joint ventures. Unfortunately, again, the cases in that context have a mixed record.

Senator GORTON. Excuse me, Mr. Baxter. May I interrupt at this point? Senator Nunn must go to the floor and I would like to give him an opportunity to ask at least a few questions before he does so.

Mr. BAXTER. Surely.

Senator NUNN. Thank you, Mr. Chairman.

I have just a couple questions. I have an amendment on the floor that I have to go speak on in just a minute.

Mr. Baxter, are you in the process of rewriting the Department's merger guidelines at this point?

Mr. BAXTER. Yes.

Senator NUNN. What is your timetable for completing that rewrite?

Mr. BAXTER. A timetable suggests more rigidity than I have associated with it: As long as it takes to do a very good job. My expectation is that we probably will have something in late winter or spring.

Senator NUNN. From the time you get through with it, what is the procedure to have those guidelines approved? What process does that have to go through?

Mr. BAXTER. There is no approval process.

Senator NUNN. In other words, when you speak, that is it.

Mr. BAXTER. Yes. On the other hand, I would expect to circulate them for comment, probably send them over to Jim Miller and see if we could get him to agree to endorse them or some variation of them.

Senator NUNN. Does the Attorney General have to approve them?

Mr. BAXTER. I do not believe so. I believe the last guidelines were simply issued as a statement of the Antitrust Division's enforcement policies. Needless to say, I would expect——

Senator NUNN. Will you let the Attorney General see them before you issue them?

Mr. BAXTER. I would expect that both the Deputy and the Attorney General would probably want to see them.

Senator NUNN. However, as far as you know you have the full authority to issue those without any approval by the Attorney General or the President.

Mr. BAXTER. They are issued without authority. They are merely a statement of the Division's enforcement intentions.

Senator NUNN. That is historically the pattern in the Justice Department?

Mr. BAXTER. Well, there is only one instance to point to, Senator, so there is not a long history or tradition there.

Senator NUNN. What is that instance?

Mr. BAXTER. The 1968 guidelines.

Senator NUNN. Was it your understanding those guidelines were approved by the Attorney General at that time or simply by the Antitrust Division?

Mr. BAXTER. I thought simply by the Antitrust Division, but I would have to go back and check on that to be certain.

Senator NUNN. You will check on it before you issue them, right?

Mr. BAXTER. It would not have occurred to me to do it without going through the Deputy and the Attorney General, so I probably would not have checked on it.

Senator NUNN. Are you going to share these guidelines, before they become public or become confirmed, with the committees of the Congress of appropriate jurisdiction?

Mr. BAXTER. I suggested to—either the Senate or the House Judiciary Committee asked if I would be willing to send them up, and I said surely that I would.

Senator GORTON. Would you be willing to include this committee in that courtesy?

Mr. BAXTER. Surely.

Senator NUNN. Do you have anybody in your Department looking at the effect of these new guidelines on small business as such.

Mr. BAXTER. Not as such, no.

Senator NUNN. How are you taking small business into consideration, then, in the issuance of the guidelines?

Mr. BAXTER. Well, the guidelines will not take small business explicitly into account. I have indicated a large number of reasons why a flexible merger policy that did not interfere with the merger process, except insofar as was necessary to comply with section 7—that is to say, interfered with mergers only when they did substantially lessen competition—was important for small business.

The mergers between larger companies, which are the ones that would typically be interfered with, or at least between companies having large market shares, have a certain anomaly about them in the sense that if we make a mistake, if we block a merger that would have been strongly competitive and would have served to reduce prices, that holds prices up in that particular industry and is good for small business.

If we make a mistake and——

Senator NUNN. Wait a minute. If you make a mistake and turn down a merger that would have been strongly competitive, that is good for small business?

Mr. BAXTER. Yes.

Senator NUNN. I am lost.

Senator GORTON. Try it again.

Mr. BAXTER. Try it again.

Senator NUNN. If you make a mistake and fail to approve a merger that would have been competitive, in other words, you turn down a merger that would have been competitive——

Senator BUMPERS. Yes?

Senator NUNN [continuing]. In other words, you turn down a merger that would have been competitive——

Mr. BAXTER. Right.

Senator NUNN [continuing]. That mistake and that failure to approve a merger that would have been competitive is good for small business?

Mr. BAXTER. Yes. A merger that is strongly competitive and reduces the costs of the merging firms, and enables them to put out a product at lower cost and lower price and to capture a bigger market share, will tend to drive out competitors, whomever they may be.

Senator NUNN. We must not be communicating.

You really believe that when you make a mistake and reduce competition that is good for small business?

Mr. BAXTER. In this particular context, yes.

Senator GORTON. The more efficient merged companies would drive out inefficient competition, whomever they may be.

Senator NUNN. Explain it one more time.

Mr. BAXTER. If there are——

Senator NUNN. You are saying that reduced competition helps small business?

Mr. BAXTER. Yes.

Senator NUNN. Reduced competition helps small business?

Mr. BAXTER. Yes. It helps everybody in the industry, including small business.

Senator NUNN. In that particular industry.

Mr. BAXTER. Yes. That is right. If two firms in an industry merge, and as a consequence of the merger they are able to reduce their costs by 10 percent, and let us say their prices by only 5 per-

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cent because they only have to reduce them by 5 percent to take over a huge chunk of the business and they are marching to the bank with the other 5 percent, they nevertheless will displace a large fraction of the other competitors in that industry. That will be bad for——

Senator NUNN. Suppose they decide they are going to take it one step further, though, now that they dominate a larger part of the market, and eliminate others, and you happen to be one of those others?

Mr. BAXTER. That is right, and if they decide to cut their prices the full 10 percent by which they reduce their costs, they may take over a very large share of the industry.

Senator NUNN. That is good for small business?

Mr. BAXTER. No, that is bad for small business. If we block that merger——

Senator NUNN. You are telling us, this Small Business Committee, that less competition is good for small business.

Mr. BAXTER. Yes.

Senator NUNN. Therefore, if General Motors takes over a huge portion of the real estate business as a way of diversifying, that is good for the real estate people?

Mr. BAXTER. I do not follow that at all. If General Motors is the lowest cost real estate operator around, and goes into the real estate business and begins selling residences at a 4-percent commission rate instead of the traditional 6-percent commission rate, and takes over a very large percent of residential sales at a 4-percent commission rate, that will be bad for all those real estate brokers whose costs seem to require them to charge a 6-percent commission rate.

Senator GORTON. But presumably good for purchasers.

Mr. BAXTER. But presumably good for purchasers.

Senator NUNN. In the short run, until all of the real estate people have gone out of business. Then what happens in the long run?

Mr. BAXTER. In the long run, why I suppose—I mean, it is your story, not my story——

[Laughter.]

Mr. BAXTER [continuing]. However, I suppose in the long run General Motors, Penney's, Sears, IBM, and A.T. & T. each have 20-percent market shares of residential real estate throughout the United States, and commission rates stay at 4 percent.

Senator NUNN. Mr. Chairman, I am delighted that I have to go to the floor. [Laughter.]

I have never heard that kind of testimony, frankly. I can understand why, Mr. Baxter, there are people around the country and people in Washington that think that some of your statements have given the green light to the kind of merger waves that we are seeing occur.

I just have never before heard anyone at such high levels with responsibility for, enforcing antitrust laws, say that less competition is good for small business. However, I will get out your testimony, your transcript, I will diagram it, and I will try to understand it. I do not at this stage.

Senator GORTON. Thank you, Senator Nunn.

Senator Nunn did ask a question on another line which I wish to follow up at this point: You have said that you would share with the Judiciary Committee, and now with this committee, your proposed guidelines.

Mr. BAXTER. Yes.

Senator GORTON. Will you do that in a fashion in which the committees can make any kind of meaningful presentation; that is to say, before it has been finally decided that these will be the new guidelines?

Mr. BAXTER. Yes, although I will not promise to adapt them in any particular way.

Senator GORTON. That is not unreasonable, but if we can make some input into them, it will be appreciated.

Now in addition to that, since these merger guidelines will obviously affect the conduct of the business community, they will be very similar to the more formal regulatory activities of many agencies of the Federal Government. Do you have any opinion on the appropriateness of holding public hearings on the guidelines before you issue them?

Mr. BAXTER. No. They do not have the status of rules. They are not binding on the courts. The courts accord them only such attention as their inherent persuasiveness commands. They are interpretive rather than legislative guidelines, merely a statement of enforcement intention. I would not have thought holding hearings was at all appropriate.

Senator GORTON. You have indicated that vertical mergers should become of serious concern to enforcing agencies only when they lead to horizontal anticompetitive effects. Does this include cases where the vertical merger may create a severe supply squeeze for firms presently competing in a relevant market? Is this a factor you will look for in evaluating proposed vertical mergers?

Mr. BAXTER. That is an effect I would look for, although I think that that in fact is an extremely infrequent instance. The mere fact that a significant supplier or a significant purchaser is acquired and in that sense foreclosed by no means suggests that the phenomenon you have referred to is present.

Let's talk of a manufacturing company that acquires some wholesalers. The manufacturing company, let us say, has 10 percent of the market at the manufacturing level, and its products represent 10 percent of the products at the wholesale level. If it now acquires wholesalers who represent roughly 10 percent of wholesaling capacity, they are either exactly the same wholesalers it was dealing with before—in which case nothing really has changed—or they are different. If they are different, then he is going to release the 10 percent of the wholesalers he has dealt with heretofore in dealing with the new ones.

Therefore, very rarely as a consequence of a vertical merger is there any kind of effective foreclosure that could be called a squeeze. A manufacturer cannot go around who produces only 10 percent of the goods and acquire 30 percent of the wholesaling capacity. It would be a financial disaster for him to do so; he cannot utilize that much capacity. Therefore, only under very unusual circumstances is there a realistic possibility of a squeeze as a consequence of a vertical acquisition but it is what you would look for.

The problem in this context is that a number of the early decisions sort of automatically regard the acquisition of a source of supply or of a purchaser as a kind of ipso facto squeeze. They use sensible language in the sense that they talk about foreclosure; it is in some ways the right concept to talk about but they are totally unrealistic in their factual approach because there is no realistic possibility of foreclosure in the overwhelming preponderance of those cases.

Senator GORTON. However, it is something which you would nevertheless look for in connection with a proposed vertical merger?

Mr. BAXTER. Yes.

Senator GORTON. Will you also examine the circumstances to determine whether a vertical merger may raise barriers to entry by reducing the unintegrated portion of a customer market, so that vertical integration becomes a practical necessity for entry?

Mr. BAXTER. Yes; although that, too, is a very, very troublesome concept. Again now, let's flesh out a little bit the scenario that you implicitly have in mind. We have two stages of an industry, and in order for the independents to have been reduced very significantly there must have been a number of these vertical mergers or maybe some vertical integration without merger. Now there are just a few independents left on each of the two levels, and perhaps they are proposing to merge.

Well, a number of things go through my head: What is it that has been driving this pattern? Why have we seen so much of it between these two stages of the industry? It may be that there are significant economies of vertical integration here that have been driving this pattern. If I tell those last two guys that they cannot get together, I may be putting them at a very serious competitive disadvantage with all of their integrated brethren.

Therefore, it is a very uncomfortable kind of situation. Now one can take a very hardnosed view and say, "We will shut off the opportunity of those last two guys to merge and we will find out whether there are real economies that are driving this process. If there are, they will fail, and then we will know."

That is not a position I feel entirely comfortable with, particularly in the light of section 7, which says that we should stop mergers only where the effect may be substantially to lessen competition, and I do not have any very good basis to think that it will substantially lessen competition in the circumstances you describe.

Again, it does seem to me that it should be looked at from the standpoint of foreclosing entry opportunities, whether it realistically does foreclose entry opportunities. Again, it would seem to me seldom that it would, but it is the right question.

Senator GORTON. Does the same answer and the same general philosophy apply to the question of whether the vertical merger may co-opt the most likely potential new entrant into a concentrated market?

Mr. BAXTER. No, I do not think it does. The problems there are quite different, and I would say that this point, the potential entrant point, is the most frequent basis on which I think it would be appropriate to halt a vertical acquisition. It has some problems of its own but it does not have the problems we alluded to in the last instance.

Senator **Gorton**. I understand—and I could be wrong on this, so please correct me if you are in anyway misquoted—that in your October 27, 1981 testimony before the Senate Judiciary Committee on merger policy you expressly repudiated the view that section 7 of the Clayton Act, and I quote, "imports any greater, lesser, or different standards" than section 1 of the Sherman Act. Does that correctly characterize what you said?

Mr. **Baxter**. That is an accurate quotation. It does not capture all of the context, to be sure, but it is accurate.

Senator **Gorton**. I will go on, and give you the opportunity to say whatever you wish.

That comment echoed your response to a question from Senator Specter at the March 19, 1981, confirmation hearings, when you stated that you, and I quote again, "do not see that section 7 of the Clayton Act is anything other than coextensive with section 1 of the Sherman Act."

If that is the case, was Congress wasting its time in enacting section 7 in 1914 and then amending it in 1950? What happened to the notion of section 7 as an incipiency statute?

Mr. **Baxter**. No inconsistency whatsoever. I would rather treat 1914 separately.

Senator **Gorton**. Please do so.

Mr. **Baxter**. Section 7 as enacted in 1914 was not an antimerger provision. It was an antiholding company device, and it forbade only stock acquisitions which led to a holding company kind of structure. It was not really intended to have anything to do with mergers.

Section 7 as amended in 1950, of course, was an entirely different thing. The Supreme Court, from its decisions in 1911 in the *Standard Oil* and *Tobacco* cases, reaching a culmination about 1920 with its decision in the *United States Steel* merger case, took a very, very passive view of mergers under section 1 of the Sherman Act, very reluctant to interfere with them. The court repeated that performance in the *Columbia Steel* case in the late forties, and it was the Supreme Court's decision in the *Columbia Steel* case—although arguably right, I think, in the *Columbia Steel* case—that triggered Congress concern and led to the passage of the Celler-Kefauver amendments in 1950.

The way Congress amended section 7 in 1950, it plainly meant something quite different than the Supreme Court was then, in 1949 and 1950, saying that section 1 meant. However, since 1950 the Supreme Court and the other courts quite appropriately have brought section 1 into correspondence with what the Congress said in 1950 in section 7.

It was the only sensible thing to do, after all. Why should there be two separate merger standards, both extremely general language? Indeed, how can you contemplate the possibility of two separate merger standards? The more restrictive would always become operable and the less restrictive would simply become a redundancy. There is no jurisprudential possibility of having two different merger standards.

Therefore, section 1 has been brought into correspondence with section 7. The interpretations of the two statutes are the same, if you read the cases carefully. It is impossible, I think, to find a case that says, "Well, this came out as it did because it was brought under section 1 but surely it would have come out differently under section 7." The Supreme Court has said in several different contexts that the standards are basically the same. It is that phenomenon to which I was referring in both my statements.

Senator GORTON. Thank you.

I would now like to venture into the minefield in which Senator Nunn felt so lost, and see if I can at least appropriately, if I understand your philosophy, attempt to restate it. Was the philosophy which you expressed in responding to him that any antitrust policy if it increases competition is disadvantageous to the competitors within that relevant market because it lowers prices and thus lowers their margins of profit?

Mr. BAXTER. Right.

Senator GORTON. Therefore, in the case of a merger, if a merger which is in fact efficient is approved, it is highly disadvantageous to the other competitors in that market because they will either have to meet that more efficient competition or go out of business.

Mr. BAXTER. Exactly correct. Indeed, the most useful thing one can know about a merger is what the competitors think about it. If, when we have a merger pending in the office, the competitors run in and say, "Oh, don't let that happen, that would be awful," my instinctive reaction is to approve the merger——

[Laughter.]

Mr. BAXTER [continuing.] Whereas if they come in and say, "Oh, no problems there, that will be perfectly all right," it is a very clear signal to me that they are looking forward to a lessening of competition as a consequence of that merger, and my instinctive reaction is to oppose it. The competitors are always wrong.

Senator GORTON. That is to say, it is your view that most business enterprises, in seeking to maximize profits, seek to minimize competition at least in the area of their sales though they would like to promote it in the area of their purchases.

Mr. BAXTER. That is correct. I am sure they do not think about it that way. The human mind is a wondrously malleable instrument, and I am sure they have managed to convince themselves in one way or another that they are serving the public good, but the public and private good come into correspondence so infrequently that, as I say, the reactions one gets from competitors about mergers I think are very instructive.

Senator GORTON. Mr. Baxter, whether Senator Nunn or I agree with that philosophy or not, it is certainly clearly stated. I do understand what it is.

I have a number of other questions on resale price maintenance and the like. We do have an additional panel, however, and some considerable restriction on time. I assume that you will be willing to answer the rest of these questions if they are submitted to you in writing?

Mr. BAXTER. Surely, Senator.

Senator GORTON. Thank you very much for being with us.

[The prepared statement of Mr. Baxter and subsequent information follow:]

U.S. Department of Justice

Washington, D.C. 20530

STATEMENT OF

WILLIAM F. BAXTER
Assistant Attorney General
Antitrust Division

BEFORE THE

Productivity and Competition Subcommittee
Committee on Small Business
United States Senate

CONCERNING

Federal Antitrust Policy and Small Business

December 1, 1981

Mr. Chairman and Members of the Subcommittee: I am pleased to be here today to discuss with you the Department of Justice's antitrust enforcement policies and their impact on small business. The central concern of antitrust enforcement is protecting the competitive vitality of our economy, a goal that not only benefits consumers, but also makes it possible for enterprising and efficient small business to thrive. The Antitrust Division is firmly committed to a program of vigorous action to prevent conduct that threatens competition, while avoiding unnecessary interference with the ability of businesses to maximize their productivity and efficiency. I would like to describe briefly for you today our efforts to implement this goal in several specific areas.

I would like to begin with a discussion of the Department's merger policy. As you know, the primary statute applicable to mergers and acquisitions is Section 7 of the Clayton Act, which prohibits transactions which may substantially lessen competition or tend to create a monopoly in any line of commerce in any section of the country. This statutory language requires analysis as to whether the particular merger or acquisition under consideration threatens a significant lessening of competition in a specific market; that is, whether it creates a significant potential for adverse horizontal effects in any such market. This analysis requires a careful review of each transaction to determine the parameters of the affected market and to predict as accurately as possible the likely effect of the proposed transaction on competition in that market.

Unfortunately, the evolution of the law in this area over the past twenty or so years has been confusing and often confused. Judges, after endeavoring to cope with the totally unstructured inquiry suggested by the Supreme Court's 1962 Brown Shoe 1/ decision, decided to place primary emphasis on simplified assumptions about the competitive effects of transactions they were called upon to review; attention was confined almost exclusively to levels of market concentration and the market shares of the combining firms.

As the state of the art in economic analysis has progressed, however, it has become clear to economists and legal scholars that some of these simplified assumptions have been applied with unwarranted enthusiasm. The courts, too, during the last six or seven years have begun gradually to turn away from rigid adherence to set numerical formulae confined to market concentration and market share factors in favor of a desirably broadened analysis, permitting consideration of additional factors relevant to the realistic assessment of the likely competitive effects of any proposed transaction.

The merger enforcement policy of the Department of Justice has generally followed the evolution of the law in this area, concentrating in recent years on mergers that could adversely affect horizontal competition. Furthermore, despite the emphasis on market share and concentration data, the Division has not

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1/ Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

ignored other factors relevant to the analysis of horizontal competitive effects in determining whether to challenge particular transactions.

When the Department issued its merger guidelines in 1968, it was expressly contemplated that those guidelines would be revised to take into account future developments. 2/ Although the Department's enforcement policies have continued to evolve with new economic thinking and judicial interpretations of the Clayton Act, our merger guidelines unfortunately have remained unchanged since they were first published. As a result, they are no longer an appropriate statement of the state of the law, current economic knowledge, or the Department's actual enforcement practices. This situation has contributed to confusion and uncertainty in the business community, and needs to be corrected. Accordingly, as you know, we are now devoting substantial efforts to revising the merger guidelines.

As a part of this process, we are attempting to develop definitions for product and geographic markets that, when applied, will reflect as accurately as possible the actual state of competition in those markets. We are also searching for the most helpful ways of expressing and understanding the structure of individual markets, taking into account such factors as the number and size distribution of firms, including the merging firms. As

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2/ *See, e.g.*, Department of Justice Press Release, May 30, 1968 (announcing the release of the merger guidelines).

I have already mentioned, factors other than these concentration data are relevant to the probable competitive effects of a transaction, and we accordingly are attempting to isolate the most important of these and formulate manageable standards incorporating them.

The goal of these efforts, and of the careful scrutiny we afford each individual merger, is to identify and prevent those transactions that genuinely threaten to harm competition, while at the same time insuring that we do not deter other, potentially beneficial transactions that may contribute to productivity, cost reduction, and consumer welfare. It is important to remember that such a careful examination of the potential harms and benefits of proposed mergers is of particular benefit not only to consumers and society generally, but also to the health and well-being of small business. While protecting markets from genuine threats to competition, a more precise and realistic assessment of actual competitive conditions is less likely needlessly to frustrate competitively neutral or procompetitive transactions, and thus can help to preserve the flexibility and incentives that are crucial if small business is to flourish.

An overly simplistic approach to mergers, relying solely on a limited set of mathematical criteria and condemning transactions that a more precise analysis would not, can work to the disadvantage of small businesses in a number of ways. For example, small businesses have a strong interest in the existence of a ready market for the sale of their operations. This can be an important incentive to investment for small entrepreneurs since it enables them to recover their investment of time and money should they choose to retire or change fields. Moreover, there comes a point in the life of many successful small businesses when the individuals responsible for its success can best reap the true value of their efforts by merger with another firm able to offer significant production or other advantages. Conversely, a ready market for non-anticompetitive sales of small enterprises benefits such firms by reducing the risks of business setback, allowing a floundering business to be revived through merger with another firm that can provide a needed transfusion of finances, new management, or new ideas. In addition, a more precise examination of mergers, one designed not to interfere with transactions posing no real threat to competition, better protects small businesses for whom merger may become an important option for legitimate tax reasons; for example, achieving some degree of capital liquidity in the estates of the developers and innovators who brought them into existence.

In short, the Department's continuing commitment to vigorous enforcement action designed to prevent anticompetitive mergers while avoiding interference with competitively neutral or procompetitive transactions, far from being hostile to small business, serves to better protect valuable flexibility, incentives, and rewards that play an important role in fostering such enterprise.

Now let me turn to several other areas where I believe that the Department's antitrust enforcement policies aid small business while maximizing the welfare of consumers generally. One such area involves vertical restraints. Like merger policy, policy in the vertical area has been the subject of considerable rethinking and analytical refinement over the last two decades. It is clear that vertical distributional arrangements such as territorial restrictions or resale price maintenance arrangements may, under some circumstances, be used as devices to facilitate collusion and thus affect adversely horizontal competition. Lawyers, economists, and the courts increasingly have come to recognize, however, that that is not the whole story, and that in most instances vertical restrictions have precisely the opposite effect. Current economic analysis demonstrates that an individual firm's choice as to distributional arrangements, such as the granting of franchises or the grouping of goods and services for sale, may simply reflect the firm's judgment about the most efficient way to structure a marketing effort. Manufacturers, dealers, and consumers may benefit from the resulting strengthening of interbrand competition.

For example, vertical restrictions may be imposed to prevent dealers who do not provide services necessary for the effective marketing of the product (services such as point-of-sale information and demonstration or post-sale servicing and repair services), and who are as a consequence able to charge lower prices, from "free-riding" on the services provided by others. In the absence of restrictions to prevent such free-riding there may be an incentive for each dealer to cut back his services and attract customers who have received or will receive those services elsewhere by offering a lower price. Such free riding would ultimately decrease total services provided and thereby decrease total sales of products which require such services, an undesirable result from the standpoint of dealers as a group as well as the manufacturer. This effect may occur with respect to a variety of activities, such as advertising, promotion, and maintenance of product quality, in addition to presale services. Elimination of free-rider effects through vertical restrictions may substantially increase the efficiency of distribution processes, increase the variety of products available to consumers, and provide an enlarged role for specialized retail outlets.

The Department is sensitive to these considerations. Enforcement actions against vertical restraints and against tying have been rare in recent years because the Division has found very few instances indeed in which it seemed likely that the forbidden practice threatened any genuine harm to the interests protected by the antitrust laws. The Antitrust Division's continuing realistic approach in this area is, of course, not only of benefit to consumers, but also is of immediate direct benefit to small businesses. It is often new small manufacturing enterprises that can benefit particularly from vertical restrictions designed to induce competent and aggressive dealers to spend the time and money necessary to develop a retail market for the manufacturer's new product. Moreover, retail dealers, many of which may be small businesses, can benefit from vertical restrictions that protect their efforts to provide services from free riding by others. And needless prohibition of beneficial, efficiency-enhancing vertical restrictions may cause perverse substitution effects particularly damaging to small business. As the Supreme Court noted in Continental T.V., Inc. v. GTE Sylvania Inc, application of a rigid per se standard of liability to solely vertical distribution practices may work to the ultimate detriment of small businesses that operate as franchises, since manufacturers who are denied the means to achieve efficiencies through vertical restrictions may choose to abandon a franchise system in favor of vertical integration. 3/ In a legal environment pointlessly hostile to vertical contractual arrangements, manufacturers will engage in distribution through owned-outlets even when that pattern is not economically efficient.

Let me now turn briefly to the areas of licensing restrictions placed on patents and other intellectual property, joint ventures, and competition advocacy. In all of these areas, the Department's efforts are continuing to aid small business while protecting competition and the welfare of consumers.

Small businesses traditionally have been a key source of new ideas and innovation in our economy. Indeed, I think there is not much doubt that in the preponderance of cases, new companies are far more than proportionate contributors to the development of new ideas and new technologies. Thus, small businesses have

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3/ 433 U.S. 36, 57 n.26 (1977).

particular reason for concern that antitrust enforcers understand and respect the legitimate purposes behind patents, copyrights, trade secrets, and other forms of intellectual property. Patent rights for small potential entrants into an established market may provide a competitive edge to counter the larger, existing competitors' popular trade name, access to investment capital, or established marketing organization.

I believe it is particularly important that firms be allowed freedom to exploit fully their legitimate patent rights in ways they find most efficient so long as their licensing practices do not pose a threat to suppress competition between the patented technology and substitutes for that technology. For example, while patent tie-ins, requiring a licensee to purchase unpatented materials from the licensor, may prove anticompetitive in a few very unusual circumstances, a rigid rule prohibiting them in all circumstances is certainly counterproductive. Such practices may be designed to allow the patentee to charge the licensee an amount that is a closer approximation to the value of the license than would be attainable by forcing the patentee to measure that value by other less direct or more costly means. Further, it may provide licensees with the incentive to practice the patent by using unpatented inputs in correct proportions with the patented item. Where tie-in requirements promote efficiency without damaging competition, they may substantially enhance consumer welfare. Thus, the Division will scrutinize carefully tie-ins and other patent licensing provisions on a case-by-case basis. We will undertake enforcement actions to block those that are harmful to competition, but we will attempt to avoid interference with those enhancing consumer welfare. Analogous statements regarding other forms of intellectual property would also be accurate.

The Division's attitude toward joint ventures reflects a similar fact-intensive, case-by-case approach. Joint ventures are quite common in some industries. The inherent ambiguity in the term "joint venture" and doubts in the business community as to their antitrust implications may have led to their underutilization in some contexts, however. Although joint ventures can raise competitive concerns in particular situations, they often have procompetitive aspects. They can foster efficiencies not available to individual firms, and they can promote technological progress through synergistic innovative efforts. Unduly harsh rules suppressing the use of joint ventures may favor larger firms over smaller ones where no economies of scale exist that could not have been attained through the use of a joint venture.

Distinguishing anticompetitive joint ventures requires inquiry into their scope relative to the markets in which the participants compete, any unnecessary collateral competitive restraints and the availability and desirability of access by others. The Division's recently published Guide Concerning Research Joint Ventures is intended to assist businesses considering joint ventures by clarifying the government's enforcement policies. In examining such arrangements, the Division will give full faith and credit to their positive side, thus facilitating their use wherever appropriate, while guarding against the possible anticompetitive effects that some may present.

Finally, let me say a few words about the Division's competition advocacy efforts. As you know, in addition to its enforcement role under the antitrust laws, the Antitrust Division is continuing to act as a strong competition advocate, seeking to promote competition generally throughout those sectors of the economy subject to government regulation. Specifically, the Division continues to seek to eliminate unnecessary existing regulation, to inhibit growth of unnecessary new regulation, and to minimize the competitive distortions caused where regulation is necessary by advocating the least anticompetitive form of regulation consistent with the defined regulatory objectives. For example, entry into the trucking industry formerly was made nearly impossible by federal regulatory policy at the Interstate Commerce Commission which placed virtually insurmountable statutory and administrative burdens on new companies wishing to enter the trucking industry. Since the trucking industry has very low capital requirements, it is particularly well-suited to participation by small business. Thus, some 100,000 independent operators in the trucking industry have carried unregulated--but not regulated--commodities. These hundred thousand small businesses, and undoubtedly many others, are potential entrants into the carriage of regulated commodities. I believe the

Division's competition advocacy and legislative activities in the late 1970s contributed substantially to the eventual passage of the Motor Carrier Act of 1980, which greatly lowered these artificial barriers to entry, greatly benefiting small businesses wishing to engage in transportation of regulated commodities.

The communications industry is another key sector in which Antitrust Division enforcement and competition advocacy efforts have promoted efforts to remove barriers to the participation of small businesses in a dynamic sector of the economy. In particular, the Antitrust Division has participated in numerous proceedings before the FCC and in the courts of appeals to promote regulatory initiatives that would remove both regulatory and carrier-imposed barriers to entry. For example, we supported elimination of AT&T's foreign attachment tariff in the FCC's 1969 Carterfone proceeding, which paved the way for residential and business users to connect their own equipment to the telephone network. When the FCC's certification program for customer supplied equipment became effective in 1978, an effort also supported by the Division, the so-called interconnect market was potentially opened to full competition. In response, a multitude of firms, both large and small, have entered the business of supplying customers with equipment ranging from phones based on cartoon characters to sophisticated computer terminal equipment. Indeed, once unleashed, the demand for such equipment has been so great that AT&T turned to small businesses to purchase these consumer-oriented telephones.

We have also advocated reducing smaller firms' regulatory costs of doing business in markets they have already entered. We recently supported the Securities and Exchange Commission's proposal to relieve regional exchanges and over-the-counter market-makers, often small single-office firms, of the mandatory dissemination of quotations for exchange traded securities, thus reducing transaction costs for those firms. Similarly, we supported the FCC's proposed low power television rules which would remove or relax regulations applicable to standard television such as ascertainment requirements, program rules, commercial limitations, Fairness Doctrine compliance, and maintenance of studio facilities. Finally, we have encouraged the Depository Institutions Deregulation Committee to permit financial institutions to offer small customers, including small firms, the higher interest rates on deposit instruments or accounts currently offered only to large depositors.

Finally, let me also call to your attention our related major efforts in the government's ongoing Sherman Act monopolization case against AT&T. In that suit we are seeking relief that will ensure that AT&T is not able to use the market power conferred on it by its regulated local exchange monopolies to frustrate the emergence of competition in the markets for customer premises equipment and intercity service and in the rapidly growing information services markets that AT&T now seeks to enter. In addition, we are also seeking relief to ensure that AT&T's purchases of equipment for use in its communications networks are not unfairly restricted and that AT&T and the Bell Operating Companies do not discriminate in favor of Western Electric. As in other competitive areas, enhanced access to the Bell System procurement process will undoubtedly benefit small communications firms as well as larger enterprises.

Thus, in a variety of areas, the Department's antitrust enforcement policies directly benefit small business while simultaneously protecting competition, efficiency, and consumer welfare. And small businesses in great numbers have and will continue to thrive as the Division maintains its commitment vigorously to challenge genuine threats to competition, while striving not to interfere with non-anticompetitive business arrangements fostering productivity, cost reduction, or other efficiencies. I would stress to you, though, that the theme of our enforcement policy is the protection of free and open competition, which means that inefficient businesses, large or small, will be at a disadvantage. Some, concerned with this result, might wish to see the courts and enforcement authorities apply special antitrust standards to protect small businesses from competition, in deference to social goals other than the promotion of competition and enhancement of efficiency. But this course is not open under the law. As the Supreme Court recognized in National Society of Professional Engineers, 4/ the antitrust laws are designed to foster competition,

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4/ National Society of Professional Engineers v. United States, 435 U.S. 679 (1978).

and arguments that competition is unreasonable are inappropriate to analyses under the antitrust laws.

Moreover, an attempt to apply the antitrust laws to give special protection to inefficient small business, rather than to maximize competition and thereby to help efficient small businesses prosper, would be costly and unmanageable. Efforts to sacrifice competition, efficiency, and consumer welfare in order to aid other goals would necessarily be paid for by the consumer in the form of higher prices and reduced output. And while the courts are provided with a relatively clear and manageable decision-making guide when the inquiry is limited to positive and negative effects on competition, they would have no such manageable standard available if they were required to balance the value of competition itself against distinct values thought to inher in the promotion and preservation of small business for its own sake. The trade-off among such values necessarily is more appropriately and fundamentally a question to be resolved directly and thoughtfully by Congress itself rather than antitrust courts. The Congress has many tax, tariff, subsidy, and other tools it can employ should it choose to aid small business more directly. The goal of antitrust courts and antitrust enforcers, however, must remain the protection of competition, the pursuit of which, I believe, is where the ultimate interest of small business lies.

Mr. Chairman, that concludes my prepared remarks. I would be happy to respond to any questions you or any other member of the Committee may have.

LOWELL WEICKER, JR., CONN., CHAIRMAN

BOB PACKWOOD, OREG.
ORRIN G. HATCH, UTAH
S. I. HAYAKAWA, CALIF.
RUDY BOSCHWITZ, MINN.
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United States Senate
COMMITTEE ON SMALL BUSINESS
WASHINGTON, D.C. 20510

February 11, 1982

Honorable William F. Baxter
Assistant Attorney General
Antitrust Division
U. S. Department of Justice
Constitution Ave., 9th & 10th Streets
Washington, D. C. 20530

Dear Mr. Baxter:

In follow-up to the hearing on Antitrust Policy and Its Impact on Smalls Business held by the Subcommittee on Productivity and Competition on December 1, 1981, enclosed are questions for the Record submitted by Members of the Committee.

Your timely response will be appreciated.

Sincerely,

LOWELL WEICKER, Jr.
Chairman

Enclosure

LOWELL P. WEICKER, JR., CONN., CHAIRMAN
BOB PACKWOOD, OREG.
ORRIN G. HATCH, UTAH
S. I. HAYAKAWA, CALIF.
RUDY BOSCHWITZ, MINN.
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United States Senate
COMMITTEE ON SMALL BUSINESS
WASHINGTON, D.C. 20510

December 22, 1981

Honorable William Baxter
Assistant Attorney General
for Antitrust
Department of Justice
Washington, D.C. 20530

Dear Mr. Baxter:

Following up on the hearing on antitrust and its impact on small business held by the Subcommittee on Productivity and Competition on December 1, 1981, enclosed are questions for the record submitted by Democratic members of the Committee. Your prompt response would be appreciated.

Sincerely,

SAM NUNN

cc. Chairman Weicker

U.S. Department of Justice

Antitrust Division

Office of the Assistant Attorney General

Washington, D.C. 20530

JUL 19 1982

Honorable Lowell Weicker, Jr.
Chairman
Committee on Small Business
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am hereby submitting for the record answers to questions sent by you and Senator Nunn in follow-up to my appearance before the Subcommittee on Productivity and Competition last December. I sincerely regret the delay in responding to these questions, many of which raise difficult issues that the Antitrust Division has been addressing for some time, particularly those concerning merger policy, vertical distributional practices such as resale price maintenance, and the effects of the Robinson-Patman Act. The attached answers reflect our most current thinking on these subjects, which has advanced considerably since my appearance before the Subcommittee.

I trust this information will be of assistance to the Committee. I greatly appreciate the Committee's interest in the enforcement of the antitrust laws and its cooperation in this matter.

Sincerely,

William F Baxter

William F. Baxter
Assistant Attorney General
Antitrust Division

Enclosure

Answers to Questions Submitted by Chairman Weicker

Robinson-Patman

1. You have been quoted as describing the Robinson-Patman Act as a "dreadful piece of legislation" (Dun's Review, August, 1981), as full of "absurdities" (American Lawyer, July, 1981), and an "unjustified protection for small business from the rigors of competition" (New York Times, April 26, 1981). Your most extensive statement on that Act appears in answer to a question from Senator Simpson in connection with your confirmation hearings (letter of April 20, 1981), wherein you noted that the Act was passed largely in response "to perceived abuses of buying power on the part of large firms" but stated your view that the perception "is lacking any basis in economic reality." Do you have any empirical basis for your view as to how businessmen perceive the Act? If so, please provide that basis.

Answer: The Robinson-Patman Act was passed largely in response to widespread perception that small independent retailers were being squeezed out by large chains able to undercut them primarily because of their ability to extract discriminatory discounts and other concessions from suppliers. In fact, the competitive position of the chains was probably attributable to their greater efficiency, not to unjustified concessions extracted by abuse of buying power. The FTC report on the subject found that only about 15 percent of the chains' cost advantage over independents was attributable to lower supply prices; the rest could be traced to operating cost efficiencies. 1/ The initial perception regarding the need for the Act was therefore erroneous.

1/ Federal Trade Commission, Final Report on the Chain Store Investigation 55 (1934).

You also asked for evidence as to how businessmen have subsequently perceived the Act. The actual experiences of businessmen under the Act reflect several perceptions about it. There is widespread agreement that the Act is complex, contorted, and ambiguous. These features have resulted in significant confusion about its meaning and great difficulties in compliance. 2/ A commentator sympathetic to the Act has described it as "the most awkwardly drafted of all antitrust legislation . . . a roughly hewn, unfinished block of legislative phraseology." 3/ The uncertainty about the requirements of the Act has resulted in price rigidity and has weakened firms' ability to respond to changing economic conditions. Studying 84 Robinson-Patman cases, including interviews with relevant parties, Professor Corwin Edwards observed:

> There is a consensus of opinion among both buyers and sellers that the result has been to diminish the flexibility of prices; indeed, many of the persons interviewed viewed this as the chief virtue of the statute. 4/

Moreover, while the Act was passed largely in an attempt to protect independent small businesses, many small businesses have,

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2/ Harry L. Shniderman, "The Impact of the Robinson-Patman Act on Pricing Flexibility," 57 Northwestern U. L. Rev. 173-84 (1962); See generally U.S. Department of Justice, Report on the Robinson-Patman Act 16-17, 23-27 (1977) (hereafter "Justice Report").

3/ J. Van Cise, Understanding the Antitrust Laws 43 (1963). Another authority calls it "a masterpiece of obscurity" containing "four jurisdictional elements and five basic prohibitions, subject to three important defensive provisos." Frederick M. Rowe, Price Discrimination Under the Robinson-Patman Act 19, 36 (1962).

4/ C. Edwards, The Price Discrimination Law: A Review of Experience 630 (1959) (hereafter "Edwards").

in fact, suffered in at least two important respects. First, as the FTC's series of automotive parts and other cases show, enforcement efforts directed against buyer cooperatives have weakened the attempts of small business entities to organize into larger, more efficient units in order to compete more effectively against their larger rivals. 5/ Second, the FTC has brought many more cases under the Act against small firms rather than large ones. 6/ Thus, according to Professor F.M. Scherer, a former Director of the Commission's Bureau of Economics, it is likely that the Robinson-Patman Act has not served its stated purpose of protecting small business. 7/ More importantly, as will be shown in response to questions 4 and 5 below, whatever perceptions may be held by businessmen, the Act has resulted in competitive distortions and inefficiencies harmful to many firms and, ultimately, to consumers.

5/ Edwards at 150-52. Indeed, that author concluded that, on balance, there was "considerable probability" that small, independent firms have been hurt rather than helped by such enforcement efforts. Id. at 152.

6/ Testimony of F.M. Scherer before the House Committee on Small Business, Ad Hoc Subcommittee on Antitrust, The Robinson-Patman Act and Related Matters, Part 2, 94th Cong., 1st Sess. 144-50 (1976). An article in the Yale Law Journal reviewing FTC enforcement generally indicated that the FTC has tended to victimize small firms both in terms of the number of cases brought and the treatment accorded them relative to large firms in the conduct of those proceedings. "Small Businesses before the Federal Trade Commission", 75 Yale L.J. 487 (1966).

7/ F.M. Scherer, Industrial Market Structure and Economic Performance 580-82 (1980).

2. In further response to Senator Simpson's question on the Robinson-Patman Act, you asserted that Section 2 of the Sherman Act provides "an adequate remedy for truly predatory" practices of large firms against smaller firms. Can you give us examples from within recent years of how Section 2 of the Sherman Act has succeeded in protecting smaller firms from predatory practices?

3. How is the Antitrust Division under your leadership using Section 2 of the Sherman Act to protect smaller firms from predatory practices by larger firms?

Answer: The broad scope of Section 2 renders it an adequate remedy against predation by large firms against small firms. In making unlawful monopolization, attempted monopolization, or combination or conspiracy to monopolize, Section 2 reaches numerous practices used with intent to exclude competitors from the market. Selective price cutting, to the extent that it is predatory, would clearly fall under the scope of Section 2 of the Sherman Act.

Perhaps the best recent example of the use of Section 2 against predatory activity affecting smaller competitors is the Government's 1974 case against AT&T. [1] This case well demonstrates the efficacy of Section 2 as a remedy against predation, and we believe that the agreement reached between the Department of Justice and AT&T settling this action plainly indicates our readiness to employ Section 2 to this end in appropriate circumstances.

The complaint in the 1974 AT&T suit charged that AT&T, Western Electric and Bell Telephone Laboratories had engaged in a combination and conspiracy to monopolize interstate trade and commerce in telecommunications services and equipment. Specifically, it was alleged that, in response to actual and potential new competitors in AT&T's traditional markets, AT&T took actions, based on its control over local franchise monopolies, that unreasonably impeded competition that technological developments increasingly made possible. The United States originally sought divestiture from AT&T of the Bell operating companies and divestiture and dissolution of Western Electric, and in light of certain subsequent regulatory developments, modified its requests to obtain divestiture of the Bell operating companies in a way that would separate their local exchange functions from AT&T's interexchange, manufacturing, and other functions.

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[1] United States v. AT&T, Civil Action No. 74-1698 (D.C. 1974).

The divestiture of the Bell operating companies achieved by the proposed modification of the earlier 1956 Western Electric consent decree [2] agreed upon between the Department of Justice and AT&T is nearly identical to the relief sought by the Government, and with the injunctive provisions in the modification, substantially achieves the purposes of that case. The modification will enable firms, both large and small, to compete effectively in markets for intercity telecommunications services, customer-provided terminal equipment and telecommunications equipment, without AT&T having the ability and incentive to disadvantage those competitors by way of ownership and control of local franchise

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2/ United States v. Western Electric Co., 1956 CCH Trade Cas. ¶ 68,246 (D.N.J. 1956).

monopolies. This increased competition will benefit consumers for years to come.

Thus, Section 2 affords small competitors redress against predatory acts or abuse of economic power by dominant firms. The Antitrust Division is keenly aware of the effectiveness of Section 2 in this regard and will not hesitate to invoke it where appropriate.

4. In its 1976 [sic] Report on the Robinson-Patman Act, the Department of Justice stated, based in part upon your testimony, that the Robinson-Patman Act fosters inefficient and costly distribution patterns, often to the detriment of consumers and small businessmen. Report at 75-79. Do you have any empirical data supporting your view that the Act fosters inefficient and costly distribution patterns and, if you do, please provide that data.

Answer: The Robinson-Patman Act has created inefficiencies in distribution in at least four ways.

A. Discouraging Buyer Initiative

The prohibition on brokerage payments and the legal ambiguity surrounding functional discounts prevent buyers from being adequately compensated for distribution functions they could perform. This discourages buyer initiative and fosters inefficient distribution. For example, Professor Edwards noted that in the food industry, enforcement of the Robinson-Patman Act has led to chains purchasing in smaller quantities and insisting on more service since they were unable to obtain price concessions even where cost-justified. To meet these demands, sellers were forced to maintain expensive consignment stocks and incur other expenses. [1]

In addition, Edwards points out that attacks on functional discounts have retarded experimentation with new distribution systems and denied the cost savings that such experimentation would yield:

> The tendency of the law is to make experimentation with methods of distribution perilous. A seller whose prices are differentiated to recognize the differences in the scope and character of the distributive services performed by different distributors is in jeopardy if those distributors

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[1] Edwards at 150-52.

> compete with one another or if, but for that price difference, they might do so. 2/

Edwards further notes that there is a tendency to overlook the losses from retarding experimentation since "the economies attained by such experimentation are often not immediate and are often difficult to segregate and prove." 3/ However, in one of the few instances in which quantative estimates were made of inefficiencies attributable to the Robinson-Patman Act, it was estimated that if backhauls were fully utilized in the food industry, savings could reach up to 100 million gallons of fuel and an additional 300 million dollars per year, in 1975 dollars. 4/

B. Hampering Promotional Activities

The Act's requirement that all of a supplier's customers be accorded "proportionally equal treatment" in the furnishing of promotional allowances and services has hampered promotional activities. It is often difficult to proportionalize on an equal basis certain indivisible promotional offers, or indeed, to know what "proportionally equal treatment" requires. Thus, to limit potential exposure under the Act, a manufacturer may scale down his overall promotion efforts or devise schemes which only certain buyers may accept. Indeed, it has been observed that:

2/ Id. at 344-48.

3/ Id.

4/ Letter from Frank Zarb to Lewis Engman, Chairman, FTC, dated August 15, 1975; Letter from Albert Rees to Lewis Engman, dated April 1, 1975; Testimony of Lewis Fox, DCRG Hearings, Tr. 93, cited in Justice Report at 91, n.162.

> Under the standard of proportionality, concerns have had either to buy undesired advertising and provide services they regarded as valueless, on the one hand, or refrain from providing service or purchasing advertising they regard as desirable on the other. 5/

These effects are illustrated in cases such as Elizabeth Arden 6/, Luxor 7/, and General Foods 8/, as well as in the commercial press. 9/

C. Inducing Perverse Business Reponses to Robinson-Patman

Attacks under Robinson-Patman on conventional business practices have induced some far-reaching and perverse substitutions by buyers and sellers. Firms have responded to the Act, *inter alia*, by:

(1) establishing exclusive dealing arrangements with favored customers (and, hence, refusing to deal with small firms) to avoid the emergence of observable "discriminatory" prices;

(2) creating minor, artificial differentiation of goods sold to them and buying for private branding to prevent goods from being classified of "like grade and quality;"

(3) avoiding sellers who use brokers;

(4) buying in smaller quantities and insisting on faster delivery when dealing with brokers;

(5) increasing vertical integration; and

5/ Edwards at 629.

6/ Elizabeth Arden, Inc., 39 F.T.C. 288 (1944), *aff'd*, Elizabeth Arden, Inc. v. FTC, 156 F.2d 132 (2d Cir. 1946), *cert. denied*, 331 U.S. 806 (1947).

7/ Luxor, Ltd., 31 F.T.C. 658 (1940).

8/ General Foods Corp., 52 F.T.C. 798 (1956).

9/ *See Business Week*, November 12, 1966, at 66. The drug and, especially, cosmetic industries have suffered. *See* Rowe, "Price Discrimination, Competition, and Confusion: Another Look at Robinson-Patman", 60 *Yale L.J.* 929, 960-61, and cases cited in n.210 (1951) (hereafter "Rowe").

(6) departing from their preferred promotion efforts in order to comply with the proportionality clauses. 10/

I should point out that vertical integration, exclusive dealing, product differentiation, and other practices above are generally efficient. However, because the Robinson-Patman Act induces these practices in those market settings where they may otherwise not have been chosen, integration can be symptomatic of economic inefficiencies caused by the Act.

D. Compounding Uncertainty and Rigidity

The systematic distortions created by Robinson-Patman, such as stifling competition and preserving inefficient middlemen, are compounded by increased uncertainty, rigidity, and resources spent on legal advice -- all stemming from the ambiguity of the law. 11/ One effect has been to be cautious and "play it safe" which, in this context, has meant preserving the status quo. Businessmen have been deterred from selective price reductions which they would otherwise have undertaken in response to

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10/ For a further discussion of these effects, see Edwards at 109-13.

11/ These features have already been mentioned in response to question 1 above. In addition, a former President of the ABA Section of Antitrust Law has stated: ". . . a salesman is almost required to become a lawyer in order to know how he can meet competition and stay within the law." Testimony of Paul H. LaRue, DCRG Hearings, Tr. 205-06, cited in Justice Report at 27, n.55. Despite the fact that considerable resources are spent on legal advice concerning the Act, much uncertainty persists about the legality of various pricing practices. See "Dodo or Golden Rule?" Business Week, November 12, 1966, at 66. See also the statement of an RCA executive, Martin Bennett, DCRG Hearings, TR. 81-81a, cited in Justice Report at 45; Justice Report at 16-17, 23-27.

geographic changes in competitive pressures or demand conditions. 12/ This rigidity may have been particularly harmful in industries where pricing might otherwise be highly flexible, such as food and gasoline. 13/

All the above mentioned inefficiencies induced by the Act have ultimately lowered welfare of consumers.

12/ See Justice Report at 23-24, 26-27.

13/ See "Dodo or Golden Rule?", *supra* note 11. As Edwards observes at 567: "The broad effect is to reduce the flexibility of prices downwards by making reductions risky unless they are uniform in all markets."

5. The Robinson-Patman Act has consistently been criticized as being adverse to competition and inconsistent with the purposes of the antitrust laws. Are you aware of any probative body of evidence that Robinson-Patman, through its history, has produced a measurable increase in the cost of living or price levels, or that it has rigidified price structures, or that it has deprived consumers of the benefits of efficient distribution, or that it has perpetuated inefficiency, or unduly high profits? If you are aware of any such data, please identify it.

Answer: We have addressed the principal ways in which the Robinson-Patman Act has induced inefficiencies and resulted in higher costs to consumers. We will now focus on its effects on competition and its inconsistency with other antitrust laws. The Robinson-Patman Act has weakened or impaired competition in at least four ways:

A. Insulating Monopolists and Cartels from Large Buyer Pressure

The bargaining power of large buyers is an important force in disrupting a seller cartel because an individual cartel member has a great incentive to grant secret price cuts to large buyers, price cuts which would be matched by other cartel members, perhaps leading to the collapse of the entire cartel agreement. [1] By preventing selective discounts to large buyers, the Robinson-Patman Act insulates sellers from the pressure of large buyers, thereby promoting cartel stability. Commentators have identified numerous cases where large buyers forced down monopolistic or cartel prices, yet the practice was attacked under Robinson-Patman.

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[1] See, e.g., Morris A. Adelman, "Effective Competition and the Antitrust Laws," 61 Harv. L. Rev. 1289, 1300, 1331-32 (1948) (hereafter "Adelman").

A noted Robinson-Patman authority, Frederick M. Rowe, cites *Morton Salt* 2/, *Automatic Canteen* 3/, *Staley* 4/, and other examples of such effect. 5/

B. *Overprotecting Competitors from One Another*

Robinson-Patman has overprotected competitors from market competition in two ways. First, it has misguidedly attacked vigorous price competition as "predatory" where such competition involved sporadic, unsystematic price discrimination. A clear example of the use of Robinson-Patman to attack vigorous and desirable price competition is the *Utah Pie* case. 6/ Second, the Act has prevented buyers from assuming many middleman functions and has thereby shielded brokers and other middlemen from potential competitors. For example, the brokerage and functional discount

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2/ In *Morton Salt*, the chain stores beat down the salt industry's collusive prices. Morton Salt Co., 39 F.T.C. 35 (1944), *modified*, 40 F.T.C. 388 (1945), *set aside*, Morton Salt Co. v. FTC, *162 F.2d* 949 (7th Cir. 1947), *rev'd and remanded*, 334 U.S. 37 (1948), *modified*, 3 CCH Trade Reg. *Rep.* ¶ 14,095 (FTC 1948). The existence of collusion in the salt industry in 1943 is documented in Rowe at 950, n.142.

3/ In *Automatic Canteen*, the sellers were firms such as Wrigley with substantial brand name and market power. Automatic Canteen Co. of America v. FTC, 346 U.S. 61 (1953).

4/ In *Staley*, the seller cut its prices after discovering its fellow colluders in the glucose industry had previously undercut the cartel. A.E. Staley Mfg. Co., 34 F.T.C. 1362, 1369-70 (1942).

5/ Rowe at 945-55.

6/ Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967). For a description and critique of the case, see Ward S. Bowman, "Restraint of Trade by the Supreme Court: The *Utah Pie* Case", 77 *Yale L.J.* 70 (1967).

cases have harmed competition by favoring certain classes of distributors over others. The Attorney General's Committee to Study the Antitrust Laws concluded that this class of brokerage cases "clog[ged] competition in the channels of distribution and exact[ed] tribute from the consumer for the benefit of a special business class." 7/

C. Encouraging Information Exchange and Other Noncompetitive Interaction

One of the defenses to an allegation of unlawful price discrimination permitted by the Robinson-Patman Act is "good faith meeting of competition." The FTC's interpretation of this defense and the relevant court decisions have perversely induced noncompetitive behavior by encouraging competitors to pull their punches and by fostering information exchange among them. Specifically, at one time or another, the defense has required defendants to: (1) meet but not beat competitors' prices; (2) use price cuts to retain existing customers but not to acquire new ones; and (3) verify that the rival's price being met was actually being charged and was lawful under the Act. 8/ For example, although

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7/ Report of the Attorney General's National Committee to Study the Antitrust Laws 190-91 (1955). A good illustration of this effect is provided by Professor Davisson's study of a series of FTC cases involving cooperative buying groups in the automotive parts "aftermarket" industry. Davisson concluded that the functional discounts afforded to such groups did not provide them an anticompetitive cost advantage, but rather, enhanced competition by opening additional, innovative channels of competitive distribution. C. Davisson, The Marketing of Automotive Parts (1954), discussed in A.B.A. Antitrust Section Monongraph No. 4, The Robinson-Patman Act: Policy and Law, Vol. 1, at 67, n.253 (1980).

8/ *See* Justice Report at 23-24; Rowe at 942-45, 965-70.

rejected by the Supreme Court, defendants in the Gypsum case 9/ attempted to justify information exchange among them as necessary for verifying competitors' prices in order to comply with "the good faith meeting of competition" defense authorized by the Robinson-Patman Act. Commenting on these anticompetitive implications of the Robinson-Patman Act, a leading industrial organization economist, Morris A. Adelman, cited the Sugar Institute 10/ case as one of the most perfect restraints in antitrust history -- involving open sales prices, standardized terms of trade, and prohibitions on volume discounts -- and succinctly observed: "The fact of the matter is that the Robinson-Patman bill practically enacted the Sugar Institute code." 11/

D. Creating Uncertainty About the Legality of Competitive Actions

The great ambiguity inherent in the Robinson-Patman Act has generated considerable uncertainty concerning the legality of various pricing decisions, creating a tendency to "play it safe" and avoid aggressive pricing. 12/ The Act has restricted firms' ability to adjust prices in response to varying levels of demand and degrees of competition across different markets.

9/ United States v. United States Gypsum Co., 438 U.S. 422 (1978).

10/ Sugar Institute, Inc. v. United States, 297 U.S. 553 (1936).

11/ Adelman at 1334. The Sugar Institute case and similar cases are also discussed in Rowe at 972-73.

12/ Rowe at 976 states: "Only a uniform price policy is fully secure from a Robinson-Patman proceeding and treble damage suits."

The net result has been higher prices than would otherwise obtain because firms are reluctant to make price reductions unless such reductions are uniform in all markets. 13/

Again, each of these four responses injures competition and inevitably results in higher prices that consumers must pay.

13/ See Edwards at 567.

6. In your view, does the Robinson-Patman Act incorporate social, as opposed to economic, values? If so, will these values be preserved if Robinson-Patman is repealed on either a de facto or an actual basis? If you believe they will, please explain how such values are preserved in our antitrust laws or in any other laws. If you believe that such social values cannot be preserved without some form of additional legislation, how would you amend the Robinson-Patman Act to preserve such values?

Answer: The Robinson-Patman Act does incorporate social values to the extent that it seeks to preserve individual economic units for their own sake. It is generally recognized that it was passed primarily to meet a perceived need to protect small firms from the purchasing power of their large competitors, especially chains. However, as shown in the answers to questions 4 and 5 above, the Act has had anticompetitive effects and has fostered various inefficiencies. While we do not mean to suggest that all -- or even most -- small firms are inefficient, the net result has been to protect inefficient competitors while harming both efficient competitors and consumers. This is, of course, contrary to our fundamental economic policy. Moreover, the social objectives of Robinson-Patman necessarily impose hidden, and hence, unmeasurable costs upon the economy.

The proper purpose of the antitrust laws is to maintain an efficient, productive economy, and hence, those laws are not the proper vehicle for achieving the social values underlying Robinson-Patman, laudable though they may be. If Congress determines it desirable to continue to support a special category of firms, this should be done through some form of explicit, direct subsidy. This would remove the inconsistency between Robinson-Patman and other antitrust laws and would reveal the economic costs of preserving the relevant social values, thus enabling better informed and more rational decisionmaking.

Merger Question

7. Speaking of Section 1 of the Sherman Act and Section 7 of the Clayton Act, you said in your testimony at the hearing that "(t)he Supreme Court has said in several different contexts that the standards are basically the same."

   a. Please provide the citations to the Supreme Court decisions you referred to in that statement.

Answer: Support for the view that Section 1 and Section 7 are in conformity can be drawn from United States v. Philadelphia National Bank, 374 U.S. 321 (1963), and United States v. First Naional Bank & Trust Company of Lexington, 376 U.S. 665 (1964). In Philadelphia National Bank, the Court, in holding that Section 7 of the Clayton Act applied to bank mergers, stated, at pages 354-55:

> It is not as if the Clayton and Sherman Acts embodied approaches to antitrust policy inconsistent with or unrelated to each other. The Sherman Act, of course, forbids mergers effecting an unreasonable restraint of trade. See, e.g., Northern Securities Co. v. United States, 193 U.S. 197; United States v. Union Pac. R. Co., 226 U.S. 61; indeed, there is presently pending before this Court a challenge to a bank merger predicated solely on the Sherman Act. United States v. First Nat. Bank & Trust Co. of Lexington . . . And the tests of illegality under the Sherman and Clayton Acts are complementary. "(T)he public policy announced by § 7 of the Clayton Act is to be taken into consideration in determining whether acquisition of assets . . . violates the prohibition of the Sherman Act against unreasonable restraints." United States v. Columbia Steel Co., 334 U.S. 495, 507, n.7; see Note, 52 Col. L. Rev. 766, 768, n.10 (1952). To be sure, not every violation of § 7, as amended, would necessarily be a violation of the Sherman Act; our point is simply that since Congress passed the 1960 Act with no intention of displacing the enforcement of the Sherman Act against bank mergers--or even of § 7 against pure stock acquisitions by banks--continued application of § 7 to bank mergers cannot be repugnant to the design of the 1960 Act. It would be anomalous to conclude that Congress, while intending the Sherman Act to remain

> fully applicable to bank mergers, and § 7 of the Clayton Act to remain fully applicable to pure stock acquisitions by banks, nevertheless intended § 7 to be completely inapplicable to bank mergers.

Less than a year after its decision in Philadelphia National Bank, the Court decided United States v. First National Bank & Trust Company of Lexington, and used the same type of analysis in holding that merger illegal under Section 1 that it had used in Philadelphia National Bank under Section 7. In dissent, Justice Harlan stated that "[t]his is, if anything, a Clayton Act case masquerading in the garb of the Sherman Act." Id. at 679.

b. Is it fair to interpret your position in this regard to mean that you believe the test under Section 7 for the issue of whether the effect of a proposed merger "may be to substantially lessen competition or tend to create a monopoly," involves the same process as that involved in applying the Section 1 "Rule of Reason"? Please fully explain your answer.

Answer: I do not see Section 1 of the Sherman Act and Section 7 of the Clayton Act as anything other than coextensive. Prior to the 1950 Celler-Kefauver Act amendments to Section 7, the tendency of the Supreme Court was to construe Section 1 more narrowly than Section 7. However, Celler-Kefauver brought about closer judicial scrutiny of mergers, with a resulting substantial conciliation of the two sections as the courts correctly interpreted the general wording of Section 1 to mean the same as the more specific Section 7. With the amendments to Section 7 contained in the Antitrust Procedural Improvements Act of 1980 that make that Section applicable to "persons" and to transactions in which the parties may only "affect" commerce, I view the two sections as in complete conformity.

The judicial decisions equating the standards under these two sections are not only correct as a legal matter, but are also entirely logical. During my testimony before the Subcommittee on Productivity and Competition, on December 1, 1981, I questioned why there should be two separate merger standards, both in extremely general language. Indeed, it is impossible to contemplate the existence of two effective standards, for the more restrictive would always become operable and the less restrictive would become irrelevant. Moreover, if such a situation were to exist, it could only follow from a misconception that passage and amendment of Section 7, intended to broaden the existing standards under the Sherman Act, somehow permanently restricted Section 1 to those interpretations that preceded the enactment or amendment of Section 7. However, passage and amendment of the Clayton Act have not resulted in such judicial limitation.

c. How do you square your views of the comparison of the standards under the two statutes with the statement, which has been often repeated by the Supreme Court, that "Section 7 of the Clayton Act (including the Celler-Kefauver Amendments) was intended to reach incipient monopolies and trade restraints outside the scope of the Sherman Act." Brown Shoe Co. v. United States, 370 U.S. at 318, note 32.

Answer: Language differences between Sections 1 and 7 do not preclude the courts from deciding that acquisitions that would probably lead to a substantial lessening of competition or creation of a monopoly in any line of commerce in any section of the country under Section 7 are also contracts or combinations that unreasonably restrain trade under Section 1. As Areeda and Turner observed in their treatise an antitrust law, [1] the two statutes have not created precise and different standards of unlawful conduct. Rather, both statutes instruct the courts to prevent threats to competition, both encourage pro-competitive arrangements, and both avoid unnecessary intervention upon innocuous behavior. And, as Areeda and Turner say, no different result is required by Section 1's standard of unreasonable restraint of trade as compared with Section 7's standard of a probable substantial lessening of competition. To deny this pre-supposes that in enacting the Clayton Act and Celler-Kefauver Amendment with a merger jurisdiction narrower than Section 1, Congress deliberately sought to create two classes of merging entities, for the purpose of somehow favoring one class over the other. There is no suggestion of such an intent in the legislative history of Section 7 and its 1950 amendment. Nor did the distinction between the two sections which existed before passage of the Antitrust Procedural Improvements Act of 1980 establish a dual standard directing different results depending upon the prosecutorial choice between Section 7 and Section 1.

Enactment of the Antitrust Improvements Act of 1980 rendered all this largely a matter of historical interest illuminating the progress of Section 7 and Section 1 towards conformity.

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[1] IV Areeda & Turner, Antitrust Law ¶ 906, at 22 (1980).

As I observed in response to question b. above, the 1980 statute virtually completed the conforming process by extending Section 7 jurisdiction to any "person" whose activity "affects" commerce.

Finally, it is a misunderstanding to conclude that in every instance incipient monopolies and trade restraints are beyond the scope of the Sherman Act. The applicability of Section 1 to incipient violations is exemplified by United States v. Columbia Pictures Industries, Inc., et al, Civil Action No. 80 CIV 4438, (S.D.N.Y., filed August 4, 1980). That case was brought to block the defendants' agreement to establish and operate a joint venture providing a pay-television network program service, which was scheduled to begin operations January 1, 1981. The complaint alleged that the joint venture would eliminate price competition among the defendant motion picture companies in the licensing of motion pictures to pay television. In addition, the complaint alleged that all the defendants had agreed to refuse to license recently released films to competitors of their joint venture until nine months after those films were made available to the joint venture. A preliminary injunction was issued the day before the joint venture was to commence operations. On April 7, 1981, the Court of Appeals affirmed the District Court's issuance of an injunction. 2/

2/ 4 CCH Trade Reg. Rep. ¶ 53,428 (2d Cir. 1981).

d. How do you square your views in this regard with the Supreme Court's position that possible economies are not a defense in Section 7 cases where the proscribed anti-competitive effects are present? See FTC v. Proctor and Gamble Co., 386 U.S. 568, 580 (1967).

Answer: I do not believe that the language of the Clorox opinion forecloses an "economies defense" in the appropriate context. In Clorox, the Supreme Court said:

> Possible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies, but it struck the balance in favor of protecting competition. 3/

The Court spoke only of "possible" economies -- economies which "may" result from competition lessening mergers. Areeda and Turner point out that rejecting an economies defense predicated on mere possibilities does not mandate that the courts reject such a defense supported by more convincing proof. 4/ Moreover, while the existence of economies is not a defense to a conclusion that a merger substantially lessens competition, it can be available to rebut an inference from evidence of high market concentration that a merger presumptively significantly lessens competition. Thus, such a defense may be available to rebut a prima facie, if not an ultimate conclusion that, all things considered, the merger is likely to substantially lessen competition. 5/

3/ FTC v. Proctor & Gamble Co., 386 U.S. 568, 580 (1967).

4/ Areeda & Turner, supra note 1, ¶ 941b, at pp. 153-54.

5/ For a fuller discussion of the defense, See Areeda & Turner, supra note 1, ¶ 941b, at pp. 153-54.

The legislative history of Section 7 is not dispositive on this point. The House Committee Report stated explicitly that Section 7 was not intended to prevent a merger between two small companies that would enable them to compete more effectively with large dominant competitors, thus indicating that an economies defense of some nature was contemplated by the enactment of the Celler-Kefauver Amendments. 6/

Finally, I would point out that the Clorox Court's sole citation for its repudiation of the defense is Brown Shoe Co. v. United States. 7/ However, in Brown Shoe, the Supreme Court recognized that:

> Taken as a whole, the legislative history illuminates congressional concern with the protection of competition, not competitors, and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition. 8/

While the Supreme Court in Brown Shoe acknowledged the House Committee Report's explicit statement, it went on to say:

> But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved those competing considerations in favor of decentralization. 9/

6/ Report of the House Judiciary Committee to accompany H.R. 2734, H.R. Rep. No. 1191, 81st Cong., 1st Sess., pp. 6-8 (1949). See also Areeda & Turner, supra note 1, ¶ 941b, at pp. 152-53 & n.4.

7/ 370 U.S. 294 (1962).

8/ Id. at 320.

9/ Id. at 344 (emphasis added).

The emphasized sentences are both unsupported and contradict the Court's earlier interpretation of the legislative history that Congress was concerned with the process of competition, not individual competitors. Furthermore, to keep small businesses from obtaining by merger efficiencies possessed by competitors would provide poor protection for struggling small businesses. 10/

I should add, however, that while the efficiency defense is not precluded by law, as a practical matter, the Department will not consider a claim of specific efficiences as a mitigating factor for a merger that would otherwise be challenged, except in extraordinary cases. As pointed out in our Merger Guidelines previously furnished to the Committee, we will require, at a minimum, clear and convincing evidence that the merger will produce substantial cost savings resulting from the realization of scale economies, integration of production facilities, or multi-plant operations which are already enjoyed by one or more firms in the industry, and that equivalent results could not be achieved within a comparable period of time through internal expansion or through a merger that threatened less competitive harm. In any event, the Department will consider such efficiencies only in resolving otherwise close cases. We have taken this position because plausible efficiencies are far easier to allege than to prove, and because most important efficiencies that can be achieved through merger will be allowed under the general standards of our Merger Guidelines.

10/ Areeda & Turner, supra note 1, ¶ 941b, at p. 153.

Resale Price Maintenance Questions

1. You have implied in public statements and previous hearings, and again in your prepared statement for this hearing, in your view, resale price maintenance should not be prohibited except when used to facilitate collusion. You suggest in this regard that RPM may enhance interbrand competition and may be beneficial to small manufacturers and distributors by providing protection against the "free rider" problem. But aren't there less restrictive alternative means to protect against this problem, such as the type of "location clause" approved by the court in the GTE-Sylvania case, "pass over profits" provisions, and "primary responsiblity" areas?

2. If RPM is to be permitted when used for "pro-competitive" purposes, but not when used for "anti-competitive" purposes, won't it be very difficult to ascertain when it is used to enhance interbrand competition and when it is used to facilitate collusion or disguise a horizontal conspiracy?

3. In cases where product differentiation has created strong product loyalty for a particular brand among a significant subgroup of consumers, won't *intrabrand* competition beome especially important since *interbrand* competition won't fully protect those consumers? What is your view of RPM in that circumstance?

4. Should not independent distributors, who are closest to the retail market, remain free to resell at prices established by their own individual responses to the competitive conditions which they face in their market?

5. This debate has been going on between distinguished scholars for years. But the courts have remained absolutely firm in the face of such arguments that RPM is a *per se* violation of Section 1 of the Sherman Act. You have previously cited the *GTE-Sylvania* case for the proposition that this is no longer a clear statement of existing law. You recognize I am sure that that case did not involve RPM, nor even the strictest form of territorial restriction, but you insisted in Senate Judiciary hearings recently that the reasoning still is applicable. The majority opinion, however, clearly stated that "...we are concerned here only with nonprice vertical restrictions. The *per se* illegality of price restrictions has been established for many years and involves significantly different questions of analysis and policy." (433 U.S. at 51, n. 18.) Regardless of any complexities in the facts, the court clearly reiterated this *per se* position for RPM in the *Midcal Aluminum* case. Don't you have to concede that as much as you disagree with the soundness of the rule, the clear state of the law is that RPM is a *per se* violation?

6. The overwhelming weight of authority certainly is to that effect. Assuming, for the sake of argument, this to be the case, do you think it is wise or proper for a chief law enforcement official to publically imply that his agency will not enforce an established law?

7. Would not the proper course be to petition the Congress for a change in the law?

Answer: I have recently had occasion to develop a comprehensive, lengthy discussion of several issues pertaining to the practice of resale price maintenance. I have enclosed for inclusion in the record a copy of a recent letter I sent to Ranking Minority Member McClory of the House Judiciary Committee, which addresses these issues. I believe that this letter also addresses each of the questions you have posed concerning resale price maintenance. Of course, I would be pleased to supply additional views if there are any specific issues concerning resale price maintenance upon which you would like further elaboration.

That letter follows:

U.S. Department of Justice

Antitrust Division

Office of the Assistant Attorney General

Washington, D.C. 20530

JUN 18 1982

Honorable Robert McClory
Ranking Minority Member
Subcommittee on Monopolies
and Commercial Law
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

Dear Congressman McClory:

This is in response to your request of June 9, 1982, for a further elaboration of the views of the Antitrust Division on resale price maintenance. The problems posed by the practice of resale price maintenance are exceedingly complex ones. While this may involve repetition of some of the points I have previously made in testimony before the Subcommittee, I fear that I must burden you with a rather lengthy response in order to do justice to those complexities.

The phenomenon of resale price maintenance ("RPM") must be considered both from an economic standpoint and from a legal one. I turn, first, to the economic considerations. It is the view of the Division that the central purpose to be served by the antitrust laws is the preservation of free markets, markets characterized by intense competition, to the end that our national resources may be deployed efficiently so as to yield the largest possible quantity and the richest possible variety of goods and services to our population. In general, this end is best attained by minimizing government interference with business behavior. Business units should be permitted to conduct their affairs in accordance with their own perceptions of their own best interests in rivalry with other businesses in the same industries. Businesses should be permitted, with as few exceptions as possible, to enter and to enforce contracts on terms that are mutually satisfactory to the parties to those contracts.

The antitrust laws do, of course, represent a kind of government interference into that process of free market rivalry and constitute a limited exception to the principle of freedom of contract. But those laws should be interpreted so that they constitute a limited intrusion: private agreements should be struck down and punished only where there is a sound economic basis for supposing that the private agreements will hinder rather than advance the central objective of efficient resource allocation.

It is well established as a matter of economics--indeed it is virtually a matter of unanimous agreement--that certain types of horizontal agreements have those unwanted effects. Agreements between competitors setting minimum prices for the products they sell, agreements between competitors not to compete with one another in specific markets and other analogous agreements which lessen the intensity of competition between rivals are and should remain the central target of the Division's antitrust policy.

In contrast to agreements of those types, agreements between parties who perform sequential steps in the process of producing and distributing goods and services, agreements that are usually characterized as "vertical" rather than "horizontal," are typically conducive to competition and economic efficiency. The negotiation, execution and enforcement of contracts is an indispensable part of the process of competition. Such contracts, for example a contract between a manufacturer and a distributor, obviously circumscribe the freedom of the parties to the contract to do as they wish from moment to moment. Indeed, the very purpose of contracts is to circumscribe the freedom of the parties to them in accordance with the terms of their own agreements. They cannot be regarded as anticompetitive because they perform their intended function. The policy of the Antitrust Division is to interfere with such vertical contractual arrangements only where there is some persuasive basis for supposing that contracts of particular types reduce output, retard innovation, or otherwise interfere with economic efficiency. It is common ground among substantially all economists that vertical agreements, with only rare exceptions, do not have such consequences. The question then is whether resale price maintenance constitutes an exception to that general proposition and, if so, under what circumstances.

To facilitate our discussion, I will assume that only agreements between manufacturers and distributors are at issue, although what I say, in fact, applies to any two sequential participants in a production-distribution chain.

I start with the obvious proposition that if, in a given industry, there were dozens of manufacturers of a particular product and scores of potential distributors of that product, the freedom of any one manufacturer to enter into a resale price maintenance agreement with his subset of distributors could not possibly be harmful or anticompetitive in any way. If Manufacturer A and Distributor A entered into such an arrangement, and if its only consequence was to maintain an artificially high price for the product of Manufacturer A, then that product would soon be driven from the market by the rivalry of lower price products of other manufacturers distributed by other distributors, and perhaps by Distributor A as well.

In the context of a competitive market then, if resale price maintenance does no more than achieve artificially high prices at the distribution level, it would never be in the interest of either the manufacturer or the distributor to employ the practice. Their endeavor to do so would be a commercial mistake, only one of the many commercial mistakes that firms in a free market are free to make; and they would suffer the penalties imposed on mistakes by the process of competition. No government interference would be necessary to bring about the disappearance of the practice.

If mere elevation of resale price were the purpose of RPM, a manufacturer could achieve that result by raising his own price to the distributor and capture revenues commensurate with that higher price. Under resale price maintenance, he does not do that: he insists on a high retail price but permits the retailer to keep the revenues that derive from that higher price; and at the same time he accepts the consequence that a smaller quantity of his product will be sold because it is to be sold at a higher price. One cannot suppose that manufacturers, to their own detriment in terms of their sales volume, insist on conduct that can only fatten their distributors' profit margins and lessen their own. Plainly, manufacturers who wish to employ resale price maintenance, and who seek out distributors who are willing to enter contracts in which they promise to comply, have some other end in view.

It should be obvious that when Manufacturer A employs RPM he is attempting to create, on the part of those distributors who agree to comply, an incentive to handle his product at the distributor's level differently from the way in which it would be handled in the absence of such an agreement--in some way which the manufacturer expects will redound to his advantage in his rivalry with other manufacturers. By setting the distributor's price for each unit above his usual costs of distribution, the manufacturer may hope to induce the distributor to incur additional costs: to engage in more intensive local advertising, or to incur the expense of employing more knowledgeable and more highly trained sales personnel who will increase sales volume of the product by explaining more accurately to customers how the product should be used for best results, or to increase consumer satisfaction with the product by providing quicker and more expert post-sale repair and service facilities.

Of course, RPM will not always be effective to induce the distributor to behave in one or another of those ways. Sometimes it will be, and the manufacturer will have achieved his objective. Other times it will fail and it will serve only to elevate retail price; but in these latter cases, the manufacturer's mistake will be punished in the marketplace. Government interference is not needed. The freedom to try something different, to make mistakes and to suffer the failure in the market, is one of the most important aspects of a free market system.

Of course, no particular distributor is required to go along with the manufacturer who wishes to use RPM. A distributor may perceive at the outset, or if not at the outset then still sooner than the manufacturer, that the objective will not be achieved. The distributor is appropriately free to refuse to deal with such a manufacturer. A manufacturer cannot demand that a distributor handle his product in any particular way: he can employ RPM only if there are distributors who are willing to agree to such an arrangement. Conversely, a distributor should not be free, and in our view is not free, to demand that a manufacturer sell his product to the distributor and permit the distributor to resell that product in any way that suits the whim of the distributor from moment to moment. Distribution of a manufacturer's product by a distributor is a consensual matter, a cooperative undertaking, that should proceed on terms concurred in by each of them.

It is our judgment that manufacturers of certain types of products often have legitimate reasons for wishing to control the distribution environment in which those products are resold. If, for example, a product is technologically complex, its success in the marketplace may well depend upon the availability, at the point of sale, of technically trained sales personnel who are able both to instruct the consumer and to assist him in selecting the model, or the combination of components, that will best suit his individual needs.

There is a variety of business procedures through which a manufacturer might exercise that control. He might open his own distribution outlets, staffed with his own employees, whom he would expect to behave as he instructed; but direct distribution is not feasible for most manufacturers. Alternatively, the manufacturer might enter into long and detailed contracts with his distributors, contracts describing exactly how the sales personnel are to be trained and what they are to say to customers; but day-to-day enforcement of such contracts with a large number of distributors would be prohibitively expensive. Or alternatively, the manufacturer might simply attempt to persuade his distributors that such a selling approach promised the best chance of success and profit, both to his distributors and himself, and to encourage them to behave in that way without a contractual commitment on their part.

But a manufacturer with any sense who takes this last course will be aware that the selling practice he desires is more expensive than alternative selling practices, and he will know that the retail price will have to be high enough to cover the costs a distributor incurs in following that practice. A problem will arise if some of his distributors adhere to the expensive distribution mode and others save costs by refusing to do so. The uncooperative, since they will have lower costs, will be able to profit by reducing the retail price below the costs of the cooperative.

But if some distributors are incurring costs by following the agreed sales procedure and are selling at a higher price which cover those costs, while other distributors are not doing so and sell at lower retail prices, then the free rider phenomenon will appear. A substantial number of customers will go to the higher price outlet, will consume the time of sales personnel there to obtain the appropriate counseling, but will then leave without buying and purchase from a low cost outlet instead. It will prove to be impossible for some retailers to afford expensive point of sale services for which it is not practicable to impose a separate charge if other distributors are not doing so and are selling at prices which reflect the cost savings of not doing so. If the manufacturer is to be successful in controlling the manner in which his product is sold and the quality of point of sale services afforded in conjunction with sale of his product, he must be able to shelter the gross margins of those distributors who are complying with his wishes from the pricing pressure of distributors who are not.

I emphasize that in speaking of a manufacturer protecting his distributors' margins, I am not suggesting that he will enable those distributors to earn more than competitive profits. Protection of their margins is necessary and is afforded because their costs are higher as a consequence of their compliance with their undertaking to market the product as agreed. But it would be inconsistent with the profit-seeking objective of the manufacturer to let his distributors earn profits above the competitive level. Accordingly, he has every incentive to authorize a sufficient number of distributors who will sell the product as agreed so that rivalry between them will eliminate any but competitive profits.

It is true, of course, that RPM is not the only vehicle available to a manufacturer to shelter his distributors' margins to the degree necessary to facilitate provision of point of sale services. He may engage in direct distribution by his own employees, as I previously mentioned. He may create geographic breathing room for his distributors by authorizing each to sell only from a designated location and maintaining adequate spatial separation of those locations, the practice that was upheld in GTE-Sylvania. 1/ He may create exclusive territorial distributorships, a practice that is economically indistinguishable from the practice involved in GTE-Sylvania, or he may use resale price maintenance. One technique will be more successful in some circumstances, another more successful in another; but all the techniques have essentially the same economic consequences. Correct selection of the most cost effective technique will be in the interest of the manufacturer, his distributors and the ultimate consumer. The ability of the manufacturer and the distributor, by consensual agreement, to select the vehicle they expect to work best, including the right to make mistakes in that regard, which they will no doubt on occasions do, is also embraced by the concept of free markets and miminial government interference.

1/ Continental T.V., Inc. v. GTE-Sylvania Inc., 433 U.S. 36 (1977).

I do not mean to suggest by what I have said that the various business techniques for controlling distribution are all precise economic equivalents. They are not. The use of territorial restrictions of the several kinds I have mentioned is capable of having anticompetitive effects by facilitating horizontal collusion only under extremely rare circumstances. I will not elaborate on what those circumstances are, since they are not germane to the question you raised or to my answer. RPM can have anticompetitive consequences in a substantially more common set of circumstances. If it were difficult to distinguish those circumstances in which RPM may be harmful from those in which it cannot, one might justify a sweeping prophylactic rule banning it in all circumstances. In fact, however, the circumstances in which RPM may be harmful are relatively easy to identify. Hence, although there is economic justification for antitrust intervention when these circumstances are present, it cannot plausibly be argued that the practice should be attacked whenever it appears.

RPM can have adverse economic effects, at which the antitrust laws might properly be aimed, in two different sets of circumstances. One, which does occur with some frequency, would be presented by a situation in which the market at the manufacturing level was highly concentrated and all or substantially all of the manufacturers employed RPM. Under these circumstances, the set of manufacturers might be employing RPM as a device to facilitate and to police horizontal price fixing among themselves. No one such manufacturer could obtain an advantage by cheating on the cartel arrangement by reducing his price to retailers because his retailers would be unable to sell more of his product unless, in addition to changing his own price to them, he authorized them to change their retail prices. However, to change their authorized resale price would be a highly visible act that would be immediately detected by the other members of the cartel. Accordingly, persuasive economic grounds would exist for challenging RPM in that context.

RPM might also have adverse economic consequences in a second type of situation which is probably more theoretical than real; certainly it would rarely be encountered in the United States. If the number of potential distributors was very few and if, in addition, there were substantial difficulties which prevented manufacturers from creating additional distribution outlets, then distributors might employ

RPM as a facilitating device for collusion at the distribution level. It would be necessary for the distributors to persuade all, or substantially all, the manufacturers to adopt RPM and to establish price levels in accordance with the distributors' wishes. As I previously suggested, this course would be contrary to the interests of the manufacturers, and they could be expected to resist. Nevertheless, it is conceivable, though most unlikely, that one might encounter a situation of that type. Here, too, an economic basis for antitrust attack would exist. But where neither of these two sets of circumstances exist, no persuasive reason for bringing the antitrust laws to bear on RPM can be identified.

It is true, of course, that RPM eliminates a kind of activity that might naively be described as competition: underselling by free riders will, of course, drive down prices in the short run, but it is economically erroneous to regard all behavior that achieves short run price reductions as being competitive. From that standpoint, the activity of a patent infringer, or a pirate of copyrighted phonograph records, or indeed, sales of stolen goods in a flea market, will achieve short run price reductions. But if one takes a slightly longer point of view, it should be obvious that investments in innovation, or in the recording of phonograph records, or types of property vulnerable to theft, will be significantly reduced if the values which are created by the investment are subject to misappropriation in these ways.

Real competition results in an increase in the quantity of product which reaches the hands of consumers. The parasitic forms of competition discussed above result in a reduction in the quantity of product which reaches consumers. The same must be said of free riders who drive from the marketplace retail services that are well suited to the successful marketing of a complex product: the economic incentives for manufacturers to develop and market such products will be reduced and the quantity of such products that reaches ultimate consumers will be lessened rather than increased. These economic considerations, in combination with the peculiar and somewhat confused legal status of RPM to which I will next turn, underlie the position of this Administration with respect to RPM: namely, that it should be judged under a rule of reason approach that would result in its invalidation whenever it appeared in contexts such that the practice might be conducive to horizontal collaboration but would allow the practice in contexts where it could not plausibly be serving to facilitate collusive behavior.

So far as the legal status of RPM is concerned, it is undeniable that the Supreme Court of the United States has, in a wide variety of contexts over three quarters of a century, struck the practice down. Hence, it is not the position of the Antitrust Division that RPM "is" not illegal per se; it is our position that RPM "should" not be illegal per se in view of the competitive principles outlined above.

The Supreme Court first invalidated RPM in the *Dr. Miles* 2/ case in 1911. Justice Hughes began with the historical proposition that "a general restraint upon alienation (of chattels) is ordinarily invalid" at common law, a proposition recognized to have little relevance to antitrust analysis in more recent cases. 3/ But Justice Hughes then went on to a more pragmatic analysis: he noted that Dr. Miles had advanced by way of justification only that "confusion and damage have resulted from sales at less than the prices filed." He rejected this defense, saying,

> [T]he advantage of established retail prices primarily concerns the dealers. . . . If there be an advantage to a manufacturer . . ., the question remains whether it is one which he is entitled to secure by agreements . . . As to this, the complainant can fare no better . . . than could the dealers themselves if they formed a combination . . . to achieve the same result. . . .
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> But agreements . . . between dealers . . . are injurious to the public interest and void. 220 U.S. at 407-08.

Thus, on the first, and one of the few, occasions on which the Supreme Court has attempted to explain why RPM is harmful, it offered an explanation in economic terms that is wrong in the light of sound economic analysis. A price fixing combination at the retail level would generally be

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2/ Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

3/ *Compare* *GTE-Sylvania* *with* United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

damaging to a manufacturer's objective, and its economic consequences would bear no similarity at all to the consequences of RPM in contexts where a manufacturer would choose to negotiate with his retailers to impose it.

Even in the original case, Justice Holmes, in dissent, demonstrated characteristic insight: "I cannot believe that in the long run the public will profit by . . . permitting (retailers) to cut reasonable prices for some ulterior purpose of their own and thus to impair, if not to destroy, the production and sale of articles which . . . the public should be able to get." 220 U.S. at 412.

The use of the phrase "per se" did not develop until much later, but the court continued to treat RPM as invalid without any examination of the commercial context in which it appeared or any further examination of the economic question why it should be regarded as harmful.

The legal context became far more complicated with the Supreme Court's decision in United States v. Colgate & Co. 4/ which, although it did not permit agreements fixing retail prices, was long interpreted to authorize the manufacturer to recommend prices and cut off retailers who did not comply. Tending in the same permissive direction, the Supreme Court, in the 1926 General Electric 5/ decision, upheld the right of a manufacturer to designate retailers as his "agents," to deliver goods to them on "consignment" and to effectuate RPM in that way. These two decisions opened paths for manufacturers to achieve their legitimate purposes and thus reduced the level of conflict about RPM to some extent. Indeed, from our standpoint, the decisions were too permissive in that paths were opened in contexts where RPM might serve to facilitate horizontal collusion as well as in contexts where it could not.

The next development, too, was a permissive one: Congress enacted the Miller-Tydings Amendment and, subsequently, the McGuire Act. Thus, RPM was legalized, again in potentially harmful contexts as well in manifestly harmless ones, wherever a manufacturer was willing and able to follow the tortuous procedural requirements state law developed

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4/ 250 U.S. 300 (1919).

5/ United States v. General Electric Co., 272 U.S. 476 (1926).

pursuant to the federal Fair Trade laws and wherever he could fit his situation within the consignment device sheltered by General Electric. Controversy during this period was limited to situations in which neither of these shelters were availed of and in which the complaining party asserted that a pattern of "refusal to deal" conduct, attempted in an effort to work within the shelter of the Colgate doctrine, had nevertheless resulted in the formation of implied contracts to engage in resale price maintenance. The Supreme Court's decision in Parke Davis 6/ is the preeminent example. The decisions during this period devoted much attention to the endless legal refinements that surrounded Colgate, the General Electric doctrine and the Fair Trade laws, but none addressed the still unanswered question why RPM, in all its manifestations, should be regarded as unlawful.

The closest the Supreme Court came to offering any explanation responsive to this fundamental underlying question came in Keifer-Stewart, 7/ a case which involved maximum prices rather than minimum prices. There the Supreme Court said, "[S]uch agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." 340 U.S. at 213.

This explanation, of course, does not suffice, for it suggests the invalidity of every commercial contract since each restrains the ability of contracting parties to violate the terms of the contract. More clearly still, it does not even allude to the economic considerations on which antitrust law should be based.

In the mid-60's, the Supreme Court began to narrow the restrictions on the practical range of freedom of manufacturers, still without adequate consideration of economic consequences. In Simpson v. Union Oil Co., 8/ the Court struck down a "consignment" arrangement that was identical in every detail to the arrangement upheld in General Electric,

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6/ United States v. Parke, Davis & Co., 362 U.S. 29 (1960).

7/ Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951).

8/ 377 U.S. 13 (1964).

while steadfastly denying that it was departing from the holding in General Electric. When, if ever, consignment arrangements may be used by parties in the distribution chain remains to this day shrouded in confusion. The explanation which the Court did give in Simpson is inconsistent with the explanation the Court had offered in the leading precedent of Dr. Miles. In Simpson, the Court suggested that RPM was a device used by manufacturers to coerce a injure retailers. It said, "We disagree . . . that ther no actionable wrong or damage [to the retailer] . . . . [T]he 'consignment' agreement . . . [is] being used to injure interstate commerce by depriving independent dealers of the exercise of free judgment." 377 U.S. at 16. Thus a device, first condemned because it was thought to be none of a manufacturer's business and indistinguishable from a cartel among retailers, was characterized in Simpson as a manufacturer's device for exploiting retailers. The one description is as much without factual foundation as is the other. Thus, it remains true today that courts have failed to devote sufficient attention to the economic impacts, in different contexts, of RPM.

In our judgment, the Court's careful and thoughtful analysis in GTE-Sylvania indicates a willingness to look beyond the verbal similarities between RPM and horizontal price fixing. The treatment is curiously inconsistent with the attitude the Supreme Court has taken toward other vertical arrangements. In White Motor, 9/ for example, the Court refused to classify vertical territorial arrangements as per se illegal, saying, very wisely, "[W]e do not know enough of the economic and business stuff out of which these arrangements emerge" to justify such a classification. Accordingly, the Court held that summary judgment had been improperly granted.

Similarly, in GTE-Sylvania, a case involving location clauses, the Supreme Court overruled the per se rule it had previously laid down in Schwinn 10/ stating, [t]he rule of reason is "the prevailing standard of analysis." 433 U.S. at 49. The Court examined in detail the economic consequences of a distribution practice that is closely analogous

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9/ White Motor Co. v. United States, 372 U.S. 253 (1963).

10/ United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

to RPM, and whose economic consequences are also closely analogous to RPM, and held that the legalities of the practices must be judged under the rule of reason. "[D]eparture from the rule-of-reason standard," the Court said, "must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing." 433 U.S. at 58-59.

If that declaration is taken to mean what it says, then RPM also should be judged under a rule of reason. Nevertheless, the Court did say in a footnote, inconsistently with that declaration, "[W]e are concerned here only with nonprice vertical restrictions. The per se illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy . . . Furthermore, Congress recently has expressed its approval of a per se analysis . . . by repealing . . . the Miller-Tydings and McGuire Acts." 11/

There is, however, no necessary incongruity between the action of Congress in repealing the Fair Trade laws and a rule of reason treatment of that practice under the Sherman Act. The Fair Trade laws were far too sweeping a determination of per se legality, and we agree that they ought to have been repealed. In our judgment, the action of Congress in 1976 does not preclude the Supreme Court from reaching a conclusion that, although RPM continues to be per se illegal in those contexts in which it might facilitate horizontal collusion, it should be treated under the rule of reason in other contexts. Although both the House and Senate reports indicate awareness that the Supreme Court had previously declared RPM illegal per se and no doubt expected that they were remitting RPM to that status by repealing the Fair Trade laws, it is also true that there is nothing in the legislative history which indicates a congressional disposition to limit the power of the courts to continue, through

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11/ 433 U.S. at 51, n.18. The Court repeated these views subsequently in California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 102-03 (1980).

interpretation, the evolution and adaptation of the Sherman Act in light of the continuing development of microeconomic analysis. 12/

In our judgment, the most damaging consequences of continuation of a sweeping per se rule against RPM flow not from the fact that manufacturers cannot enter formal price arrangements with their distributors, although that would be damaging enough, but from the implications of such a sweeping rule for other forms of vertical distribution controls. Any time a manufacturer attempts to control the distribution of his goods so that they receive a more costly type of treatment at the point of sale, he must cope with the free rider problem posed by noncooperating retailers who, by refusing to incur those costs, place themselves in a position to undersell. That is true whether the manufacturer uses restricted sales territories, location clauses, exclusive dealing arrangements, or some other approach. All are nominally judged under the rule of reason notwithstanding that all involve the necessary suppression of a destructive form of price cutting which has only very short run advantages but suppresses investment incentives for new, complex products. The Supreme Court fully recognized, in GTE-Sylvania, that suppression of this type of intrabrand competition was involved and that such suppression was essential to the attainment of important, long-range goals.

Under the current state of the law, however, it is open to any retailer who refuses to market in accordance with the manufacturer's preferences, and without regard to the intensity of existing interbrand competition, to compel a manufacturer to deal with him on his terms through treble damage litigation in which it is asserted, quite accurately in a

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12/ As Robert Bork has observed: "Congress has not legislated per se illegality, either through this repeal [of the Fair Trade Laws] or in the original Sherman Act . . . . The Court, presumably, still has its original obligation to develop the law of the Sherman Act according to its best economic understanding." Vertical Restraints: Schwinn Overruled, 1977 Sup. Ct. Rev. 171, 191-92. The Court must, of course, "give shape to the statute's broad mandate" [National Society of Professional Engineers v. United States, 435 U.S. 679, 688 (1978)], through the exercise of "lawmaking powers" [Texas Industries, Inc. v. Radcliff Materials, Inc., 101 S.Ct. 2061, 2069 (1981)].

sense, that a purpose and an effect of the territorial arrangement selected is to suppress intrabrand price competition. In short, the per se rule against RPM goes far to subvert, in practice, the rule of reason treatment which is, in theory, accorded to all other vertical distribution controls. So long as manufacturers must abide the outcome of trial before juries--juries most often composed largely of persons with no business experience--on the question whether "price fixing" in that sense was a purpose or effect of the selected distribution arrangement, manufacturers will be strongly deterred not just from entering formal price arrangements, but from resorting to a wide variety of distribution controls.

We regard that state of the law as unsatisfactory, and are reviewing the possibility of asking the Supreme Court to change it. We recognize the importance to the general public of the principle of stare decisis and the desirability of promoting certainty in legal rules. However, the Supreme Court itself has emphasized the superior importance of refining legal analysis in the field of vertical restraints. In Sylvania, the Court did not hesitate to reverse its own recent decision in Schwinn based on improved economic analysis. In view of the Court's action in Sylvania, it is not inappropriate to seek reconsideration of a legal doctrine which, we believe, has the unintended effect of injuring American consumers. If, however, the Court is disinclined to modify its traditional approach in this area, or if the Court reads the 1976 legislation as foreclosing its ability to reconsider the issue, we will then consider the appropriateness of seeking legislative change.

Thank you very much for your interest in our antitrust enforcement policies. I hope this information will help further articulate our position on this matter.

Sincerely yours,

William F. Baxter
Assistant Attorney General
Antitrust Division

Answers to Questions Submitted by Senator Nunn

General Questions

A. There has been a great deal of attention given to your statement about what you won't do in the antitrust area. Do you have an affirmative antitrust program for small business?

Answer: As I testified before the Subcommittee, pursuit of an economically rational antitrust enforcement policy is the best guarantee that enterprising and efficient small businesses will survive and prosper. Numerous undertakings of the Antitrust Division, in greater or lesser degree, redound to the benefit of small business while maximizing efficiency, productivity, the competitiveness of U.S. products in foreign markets, and consumer welfare generally. I need only mention some of the Division's activities in this regard: application of careful analysis to mergers and acquisitions, vertical restraints, joint ventures, and the exploitation of rights in intellectual property; vigorous prosecution of price fixers, and other horizontal restraints; and competition advocacy before regulatory agencies.

The Division's policies in areas such as these benefit small businesses in numerous ways. New entry is facilitated, predation is deterred and punished, invention and innovation are encouraged and productivity and economic growth are enhanced. For example, our policies regarding vertical restraints and intellectual property rights facilitate market entry by small businesses. Our merger policy affords small enterprises the opportunity to expand through mergers with firms offering significant production complimentarity or other advantages. Our case-by-case approach to joint ventures assures that cooperative efforts among small firms will not be condemned out of hand by unduly rigid rules.

Finally, through our competition advocacy, we attempt to eliminate unnecessary entry barriers and other economic regulatory burdens upon small business. For example, we have helped to open markets and reduce regulatory restraints for thousands of small businesses as a result of deregulation efforts in the airline, trucking, intercity bus and telecommunications industries.

B. Do you intend to continue the longstanding practice of assigning a small business liaison official in the Antitrust Division?

Answer: Yes. Last July I designated one of my Special Assistants, Jeffrey I. Zuckerman, to serve as the Division's small business liaison official.

Private Antitrust Enforcement

A. Do you encourage private enforcement of the antitrust laws?

Answer: Private litigation certainly has a very important positive role to play in antitrust enforcement. For example, the threat of treble-damage actions is a very important deterrent to horizontal price fixing. On the other hand, the "creativity" of plaintiffs' counsel in private antitrust actions has contributed in no small measure to judicial grafting of anticompetitive notions onto the antitrust laws. I encourage private enforcement of the antitrust laws to the extent that plaintiffs' theories are consistent with rational antitrust policy.

B. Mr. Baxter, in your experience, is it expensive to privately litigate an antitrust action?

Answer: There are often substantial expenses involved in antitrust litigation, but I do not believe they are inevitable. For example, extensive costs are often incurred during pre-trial discovery because courts fail first to require the parties to articulate their theories precisely and then to limit discovery to relevant matters. Proper judicial case management could substantially reduce the cost of private antitrust litigation.

C. Are small businesses capable of committing the financial resources necessary to undertake that litigation?

Answer: The thousands of antitrust cases that have been filed by small businesses indicate that such firms are able to undertake such litigation. It should be remembered that a plaintiff's greatest expense in antitrust litigation, its attorney's fees, commonly are not borne by the plaintiff during the litigation. Attorneys representing plaintiffs in antitrust actions often work on a contingency fee basis, which substantially reduces the cost of the litigation to the plaintiff.

D. If the two antitrust agencies cannot sustain the vigorous antitrust enforcement that small business may believe crucial to their survival, would you consider support for nonfinancial assistance to buttress their private efforts? For example, it has been suggested that small business may be better able to privately "enforce" the laws if they can initiate it as a class action.

Answer: I have seen no evidence that the Antitrust Division and the Federal Trade Commission are not able to sustain vigorous antitrust enforcement. Indeed, as I have said before, I do not believe that it is necessary or desirable to have two agencies engaged in antitrust enforcement. While I am unsure of what is meant by "nonfinancial assistance to buttress . . . private efforts," I note that small businesses may now initiate antitrust suits as class actions if they satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure.

"Smog Decree"

The Department did not seek an extension of the "SMOG" decree that prohibited auto companies from working together on various legislative and regulatory issues. With that consent decree lifted:

a. Would it be permissible for representatives of the various domestic auto firms to meet together to develop a common position on pending regulatory decisions?

b. Would it be permissible for representation of the various auto firms to join together in lobbying efforts directed at the Congress or the Executive Branch?

c. Would it be permissible for the various auto firms to work together in common research efforts designed to assist them in individually meeting regulatory standards?

Answer: Except for two of its provisions [Section IV(A)(2)(a) and (g)], which expired in 1981, the decree in United States v. Motor Vehicle Manufacturers Ass'n., Civ. No. 69-75-JWC (C.D. Cal.) (the "Smog" Decree), is still intact, although the Department and the defendants have proposed a Modified Final Judgment, which has been lodged with the Court and has been subject to public comment.

The "Smog" Decree was entered in 1969 in settlement of civil antitrust charges against General Motors Corporation, Ford

Motor Company, Chrysler Corporation, American Motors Corporation and the Automobile Manufacturers Association (now the Motor Vehicle Manufacturers Association). Most of the provisions of the decree are perpetual. However, Sections IV (A)(2)(a) and (g) were specifically limited to ten years, unless the Government applied for their extension.

In our view, within certain limitations, each of these activities is now permissible under the "Smog" Decree. The following brief review of the restrictions imposed by the expired provisions might help explain the circumstances under which these activities are allowed.

Section IV(A)(2)(a) prohibited the defendants from agreeing to exchange "restricted information," i.e., company confidential information, relating to development of motor vehicle emission control devices. Section IV(A)(2)(g) enjoined the defendants from filing joint statements with Government regulatory agencies charged with promulgating motor vehicle emission control or safety standards. Nevertheless, that provision contained an exception which permitted the defendants to comply with a specific request by an agency for such a joint statement, and it also allowed the defendants to submit joint statements on a variety of other topics, including the scientific need for any standard or regulation. The joint statement restriction applied only to presentations to Government regulatory agencies; nothing in the decree restricted the defendants' lobbying efforts before Congress or before Executive Branch agencies which do not perform regulatory functions.

Thus, in further specific response to part (a) of your question, to the extent that a collective assistance agreement contemplated an exchange of restricted information between the defendants, it was specifically prohibited by Section IV(A)(2)(a) of the decree. And, to the extent that a joint lobbying effort involved the defendants' submission of an unsolicited joint statement on automakers' ability to comply with an emission control or safety standard, that was prohibited by Section IV(A)(2)(g) of the decree.

While these particular provisions have expired, the decree's permanent provisions continue to impose important restrictions on the defendants' participation in collective activities. For instance, two provisions relate to the defendants' development of common positions on pending regulatory matters. Section IV(A)(2)(c) prohibits them from agreeing to delay installation of any emission control device or otherwise restrain individual decision-making on installation dates. Section IV(A)(2)(h) specifically prohibits the defendants from agreeing not to submit a separate statement to a Government regulatory agency. Together, these provisions prohibit the defendants from colluding to delay compliance with present regulatory standards or to forestall enactment of more stringent requirements.

In further specific response to part (b) of your question, it should be emphasized that simply developing and presenting a common position on a pending regulatory matter, an activity which has traditionally been protected by the First Amendment and the Noerr-Pennington doctrine, would not violate this decree. The decree never prohibited activities directed at Congress or Executive Branch agencies not having authority to promulgate emission control or safety standards.

In further specific response to part (c) of your question, the decree did not prohibit joint basic research, but did prohibit exchange of company confidential information relating to specific product development. Assuming the decree is modified as requested, then common research efforts designed to assist the companies in individually meeting regulatory standards would be permissible so long as such activity was not violative of the antitrust laws.

The decree also imposes two types of permanent restrictions on the collective assistance agreements into which the defendants might enter. First, Section IV(A)(1) enjoins the defendants from conspiring to limit, restrain, or prevent the development, manufacture, installation, or sale of any emission control device. This provision is broadly drafted to prevent any agreement which unduly restricts competitive development or sale of emission control devices. Whether a particular assistance agreement is proscribed by this provision depends upon the factual circumstances under which the agreement is executed, including such factors as the parties' intent, the duration of the agreement, and the market shares or relative economic strength of the parties. For example, because of their sheer size, economic power, and substantial capacity for independent development efforts, any collective assistance agreement between General Motors Corporation and Ford Motor Company would warrant special attention under the decree, while a similar agreement between two companies financially and technologically less capable might not present a competitive concern.

Second, the decree's remaining injunctive provisions do not prohibit collective assistance agreements per se, but proscribe particular terms which might be employed in such agreements, namely, those that provide for (a) cross-licensing of future patents relating to emission control devices, (b) restrictions on publicity given to research efforts, (c) joint assessment of third-party patent rights, or (d) acquisition of patent rights on a most-favored-purchaser basis. Because these restrictions have outlived their usefulness and may be anticompetitive, we have applied to the court for their termination. Copies of the supporting papers are enclosed for your information.

Mergers

In testimony before the Senate Judiciary Committee in July 1979, you stated that, "I don't think there is any particular reason to believe there would be a rash of acquisitions by the oil companies as a result of their augmented cash flow."

Recently, a significant number of acquisitions have taken place in the oil industry. Financial circles are convinced that more mergers are being planned. You also pointed out that oil companies represent only 2-1/2 to 3 percent of gross domestic product. Between 1978 and 1980, oil companies were responsible for 98% of the increased net income in the Fortune 500.

A. Would you support any proposal to limit oil company mergers or acquisitions?

Answer: No. I believe that the present antitrust laws are adequate to deal with any competitive problems that might be presented by major oil company mergers. Section 7 of the Clayton Act and, for that matter, Section 1 of the Sherman Act, prohibit mergers that are likely to substantially harm competition or decrease consumer welfare. Our recently released revised Merger Guidelines, a copy of which has been supplied to the Committee, clearly articulate an enforcement policy based on preventing harm to competition and maximizing consumer welfare. Under these Guidelines, the Antitrust Division will continue to enforce the law vigorously against anticompetitive mergers in energy, as well as other, markets.

Proposed new legislation based on a standard other than preventing harm to competition and consumer welfare is likely to be inefficient and costly. It would unnecessarily interfere with capital markets and investment discretion which is properly entrusted to the private sector in our free market economy. The efficiency of energy markets, like that of other markets, is enhanced when capital is invested where it yields the greatest return. Interference with this process is unlikely to increase energy production significantly, but would be likely to harm the performance of the economy as a whole.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC.; GENERAL MOTORS CORPORATION: FORD MOTOR COMPANY; CHRYSLER CORPORATION, AND AMERICAN MOTORS CORPORATION, Defendants.	Civil Action No. 69-75-JWC STIPULATION Filed: February 8, 1982

IT IS HEREBY STIPULATED by and between the parties, through their respective counsel and subject to the approval of the Court, that in connection with the parties' joint motion for a judgment modification and the Court's orders of November 19, 1981, and January 14, 1982:

1. The Modified Final Judgment, lodged with the Court on November 9, 1981, may be filed and entered by the Court, upon the motion of any party or upon the Court's own motion, at any time after compliance with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. §§16(b)-(h) (1976), has been reported to the Court, provided that plaintiff has not withdrawn its consent, which it may do at any time before the entry of the proposed Modified Final Judgment by serving notice thereof on defendants and by filing that notice with the Court.

2. In the event plaintiff withdraws its consent or the proposed Modified Final Judgment is not entered pursuant to this Stipulation, this Stipulation shall be of no effect whatsoever, and the making of this Stipulation shall be

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without prejudice to any party in this or any other proceeding.

Dated: February 8, 1982

FOR PLAINTIFF:

Bernard M. Hollander

Gregory B. Hovendon

Anthony E. Harris

Attorneys for the United States

FOR DEFENDANTS:

WILMER, CUTLER & PICKERING

By:

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA Plaintiff, v. MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC.; GENERAL MOTORS CORPORATION; FORD MOTOR COMPANY; CHRYSLER CORPORATION; AND AMERICAN MOTORS CORPORATION, Defendants.	Civil Action No. 69-75-JWC COMPETITIVE IMPACT STATEMENT Filed: February 8, 1982

I. THE NATURE AND PURPOSE OF THIS PROCEEDING

On November 9, 1981, the United States and the defendants filed a joint motion to modify the Final Judgment entered in this civil antitrust proceeding on October 29, 1969 (hereinafter, "Judgment" or "decree"). The proposed modification would vacate several provisions of the Judgment, substantially revise certain other provisions, and impose a five year termination date on the modified Judgment, as so revised. The Modified Final Judgment would eventually bring to an end nearly two decades of regulation by the Court regarding the defendants' development, manufacture and installation of motor vehicle emission control devices.

On January 14, 1982, the Court ordered the United States to comply with the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. §§16(b)-(h), both with respect to the proposed modification and to the United States' withdrawal of its request for an extension of two decree provisions which otherwise would have expired. While not believing that compliance with the APPA is required in this situation, the United States is nonetheless complying with the Court's directive in order to avoid further delay in the Court's consideration of the proposed modification. Accordingly, this Competitive Impact Statement summarizes the previous proceedings in this action, discusses the withdrawal of the Government's request for an extension of the expiring provisions, and describes the proposed modification and its anticipated competitive impact.

II. THE EVENTS GIVING RISE TO THE PROPOSED MODIFICATION

A. Procedural Background

1. The Complaint and the Final Judgment

The civil complaint that initiated this antitrust action was filed on January 10, 1969, following a lengthy grand jury investigation. The complaint charged that, beginning in 1955, and continuing at least until the filing of the suit, the four major domestic automobile manufacturers, General

Motors, Ford, Chrysler and American Motors, and their trade association -- now the Motor Vehicle Manufacturers Association -- conspired with others to eliminate competition in the development and installation of motor vehicle emission control devices in violation of Section 1 of the Sherman Act, 15 U.S.C. §1. Specifically, the complaint alleged that the defendants agreed to delay installation of existing emission control devices and to forestall the development of improvements to such devices. It also charged that the defendants conspired to misrepresent the industry's technological progress in order to delay the imposition of more stringent motor vehicle emission control standards.

On October 29, 1969, this action was settled by the entry of a Final Judgment to which the parties consented. The Judgment requires the defendants to terminate the complex network of cross-licensing and patent pooling restraints into which they had entered, 1/ and to grant royalty-free licenses under the patent rights and make available the technological know-how, which had been acquired and licensed pursuant to that arrangement. 2/ The Judgment further enjoins the defendants from conspiring with others to prevent or delay development or installation of emission control devices. 3/

1/ Judgment, §§IV and V.

2/ Id., §VI.

3/ Id., §§IV(A)(1) and (A)(2)(c).

It also specifically prohibits agreements restricting publicity of research relating to such devices, 4/ conditioning the acquisition of patent rights upon the availability of such rights to others on a most-favored-purchaser basis, 5/ or providing for joint assessment of any third person's patent rights 6/ or the cross-licensing of future patent rights. 7/

As an added prophylactic measure, two provisions of the Judgment, Sections IV(A)(2)(a) and (g), prohibited the defendants from colluding to retard development and installation of vehicle emission control and safety devices by less obvious means. Section IV(A)(2)(a) enjoined the defendants from agreeing to exchange "restricted information," *i.e.*, company confidential information relating to applied emission control research. Section IV(A)(2)(g) enjoined the defendants from filing joint statements with government agencies charged with promulgating motor vehicle emission control or safety standards. Although the other provisions of the Judgment are perpetual, these two provisions were expressly limited to ten years, unless the United States should apply for their extension. 8/

4/ Judgment, §IV(A)(2)(d).

5/ *Id.*, §IV(A)(2)(f).

6/ *Id.*, §IV(A)(2)(e).

7/ *Id.*, §IV(A)(2)(b).

8/ *Id.*, §IX.

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2. The Request for an Extension of Sections IV(A)(2)(a) and (g) of the Judgment

On October 27, 1978, the United States filed a motion for an extension of Sections IV(A)(2)(a) and (g) of the Judgment. The motion was supported by factual material prepared by officials of the U.S. Environmental Protection Agency, the National Highway Traffic Safety Administration, and the California Air Resources Board. The defendants strenuously opposed the motion and submitted numerous counter-affidavits from company executives, engineers and economic consultants.

The Court initially granted the United States' request. United States v. Motor Vehicle Manufacturers Ass'n., 1979-1 Trade Cas. ¶62,557 (C.D. Cal. 1979). On reconsideration, however, it vacated that decision and denied the motion, holding that an extension of the expiring sections was unwarranted under the facts which had been presented. 1979-2 Trade Cas. ¶62,759 (1979). The Court found that circumstances had changed so dramatically since the entry of the Judgment in 1969, that an extension of the expiring provisions would be "inappropriate, counterproductive, and unjust" (Id. at 77,232), a conclusion it reiterated in also denying the United States' request for a temporary extension of the expiring provisions pending the resolution of its appeal. Subsequently, however, the Court of Appeals did extend the provisions for the duration of the appeal.

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The litigation culminated in a mixed ruling by the Court of Appeals for the Ninth Circuit on April 23, 1981. United States v. Motor Vehicle Manufacturers Ass'n., 643 F.2d 644 (9th Cir.). The Court of Appeals set aside the Court's denial of the motion, but did not reinstate the extension. Instead, it remanded the matter for a wide-ranging evidentiary hearing on the merits of the motion for extension, leaving the Court free to reach the same adverse conclusion as before, after entering appropriate findings of fact. 643 F.2d at 651-52.

B. Reassessment of the Judgment

On April 6, 1981, as one of many steps taken by the Administration in its Automobile Industry Program, the President requested the Department of Justice to review the continued need for each of the provisions of the Judgment, 9/ which review was undertaken in early May, 1981, immediately after the pending appeal had been resolved.

1. The Expiration of Sections IV(A)(2)(a) and (g)

As a result of its review, the Department concluded that its motion for an extension could no longer be sustained, since each of the agencies that had supplied factual material in its support had either abandoned or substantially moderated its previous position.

9/ Statement by the President on the Program for the U.S. Automobile Industry, 17 Weekly Comp. Pres. Doc. 403 (April 6, 1981).

During the pendency of the appeal, the National Highway Traffic Safety Administration (NHTSA) indicated that it no longer viewed the restriction on submission of joint statements (Section IV(A)(2)(g)) as essential to competition in the development of motor vehicle safety devices or relevant to NHTSA's regulatory efforts. 10/ It thereafter invited the defendants to submit joint statements on any motor vehicle safety subject. 11/

The Environmental Protection Agency took no formal position on an extension of the expiring provisions. It did, however, adopt a "liberal waiver policy" with respect to the restriction on submission of joint statements, 12/ and that, in our view, significantly undermined the case for an extension of the expiring ban on exchanges of restricted information (Section IV(A)(2)(a)). 13/

10/ Office of the White House Press Secretary, Fact Sheet on Actions to Help the U.S. Automobile Industry, p. 6 (April 6, 1981) (attached as Exhibit 1).

11/ Letter from Raymond A. Peck, NHTSA Administrator, to V. J. Adduci, MVMA President (August 17, 1981) (attached as Exhibit 2).

12/ Fact Sheet, *supra*, at 6.

13/ The two restraints are closely interrelated; the efficacy of each rests upon the continued existence of the other. For example, an extension of the restriction on submission of joint statements would be meaningless if the defendants

(Footnote 13/ continued on next page.)

Finally, the California Air Resources Board (CARB) informally advised the Department that, while it continued to support an extension of the restriction on submission of joint statements, it believed that the ban on exchanges of restricted information had become an anachronism. CARB indicated that motor vehicle emission control and fuel economy technology had become so intertwined that many devices now perform both functions. It reasoned that since there are sufficient economic incentives for defendants to produce fuel efficient vehicles, a relaxation of the ban on exchanges of restricted information should not appreciably affect the development of emission control devices.

In light of the erosion of support for an extension, the United States concluded that its evidence was insufficient to persuade the Court to extend the expiring provisions. It therefore permitted the temporary extension of the provisions

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(Footnote 13/ continued.)

were permitted to tacitly coordinate their responses to regulatory initiatives by pooling restricted information. Conversely, it would not make much sense to extend the ban on exchanges of restricted information if the defendants were free to meet and prepare joint statements concerning their individual abilities to comply with any actual or proposed emission control standard. Such open-ended discussions would make it virtually impossible for the Government to police the ban on exchanges of restricted information.

to expire, and withdrew its motion for extension from further consideration by the Court. Subsequently, the parties stipulated to a removal of that moot motion from the Court's calendar.

2. Review of the Remaining Provisions of the Judgment

After reviewing the other provisions of the decree and considering the superseding industry developments, the United States concluded that the Judgment should be modified to allow the defendants to engage in joint activities which are not anticompetitive. Representatives of the parties thereupon engaged in intensive negotiations over the course of several months to produce a modified judgment that would continue to stimulate diverse and competitive solutions to motor vehicle emission control problems, without exacerbating the industry's depressed economic condition.

The proposed modification is the product of the United States' extensive review of the Judgment and its subsequent negotiations with the defendants. However, the decision to permit the expiration of Sections IV(A)(2)(a) and (g) was made by the United States alone in an exercise of its prosecutorial discretion.

III. EXPLANATION OF THE PROPOSED MODIFICATION OF THE JUDGMENT

The proposed Modified Final Judgment seeks to remove any impediment to the defendants' participation in joint business arrangements which are not anticompetitive. To this end, it would revise the Final Judgment in three significant respects.

First, the defendants would no longer be prohibited from entering into any agreement which cross-licensed after-acquired patents, restricted publicity of research and development efforts, jointly assessed third party patent rights, or licensed patent rights on a most-favored-purchaser basis. 14/ They would, instead, be required to file copies of such agreements with the United States for review. 15/ If circumstances warrant it, the United States could then challenge any such agreement under the antitrust laws, or under the remaining injunctive provisions of the decree, which broadly prohibit any agreement that limits, restrains or prevents the development, manufacture, installation, or sale of motor vehicle emission control devices. 16/

Second, two exemptions would apply to these broad remaining injunctions. One would enable a defendant to pursue an otherwise lawful joint research and development project. 17/ The other would permit a defendant to undertake a lawful joint venture with any non-defendant firm in which the defendant holds a significant equity interest, or with any firm that holds such an interest in it. 18/

14/ See Judgment, §§IV(A)(2)(b), (d), (e) and (f).

15/ Modified Judgment, §V.

16/ Id., §§IV(A) and (B)(1).

17/ Id., §IV.

18/ Id., §IV(B)(2).

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Third, the Modified Final Judgment would be subject to a five-year termination date. 19/

In addition, the Modified Judgment would revise the original Judgment in a number of minor respects. For example, it would eliminate those outdated provisions which require dismantlement of the long-abandoned AMA cross-licensing agreement, or which define or otherwise limit terms employed in the now-expired restrictions on exchanges of confidential information and presentation of joint statements. 20/ It would also eliminate the publication requirement of the old decree (Judgment, §VII), and slightly revise former Section IV(B)(3) to eliminate any need for the table listed in Appendix A. See Modified Judgment, §VI(B)(1). Further, it would make it crystal clear that since the ban on presentation of joint statements has now expired, the decree is no longer intended to prevent the filing of such statements. Modified Judgment, §VI(C).

Several minor changes are proposed in the retention of jurisdiction and visitation clauses of the old decree (Judgment, §§X and VIII) to conform them to corresponding provisions in more recent antitrust consent decrees. The changes proposed for the retention of jurisdiction clause are not substantive. The revised visitation clause, however, would accord the defendants somewhat greater protection with respect to con-

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19/ Judgment, §§II(B), IV(B)(1), IV(C), V and IX.

20/ Modified Judgment, §X.

fidential documents, while giving the United States the right to demand sworn compliance reports and to use information obtained pursuant to the Modified Judgment for lawful purposes other than judgment enforcement.

IV. ANTICIPATED COMPETITIVE EFFECTS OF THE PROPOSED MODIFICATION

The Final Judgment was intended to eliminate the anticompetitive effects of the defendants' conspiracy and to restore and maintain the competitive climate which might have prevailed had the defendants not entered into their anticompetitive arrangement. The proposed modification is intended to encourage the continuation of such a procompetitive climate.

Four of the activities enjoined by the Judgment are not unlawful in isolation. There are undoubtedly circumstances under which an agreement to cross-license future patents, to restrict publicity concerning joint research efforts, to jointly assess the value of another's patent rights, or to license a patent on a most-favored-purchaser basis might be reasonably ancillary to an otherwise procompetitive research joint venture, and thus offer offsetting economic efficiencies despite an incidental effect upon market competition. 21/

21/ See, e.g., Technograph Printed Circuits, Ltd. v. Bendix Aviation Corp., 218 F. Supp. 1 (D. Md. 1963), aff'd on other grounds, 327 F.2d 497 (4th Cir. 1964); Congoleum Industries, Inc. v. Armstrong Cork Corp., 366 F. Supp. 220 (E.D. Pa. 1973),

(Footnote 21/ continued on next page.)

But there are also situations in which each of these types of agreements may be anticompetitive notwithstanding any theoretical benefit to the economy, because of the percentage of the market affected, the purpose of the restraint, its effect on market competition, or other factors. 22/

(Footnote *21*/ continued)

aff'd, 510 F.2d 334 (3rd Cir.), *cert. denied*, 421 U.S. 988 (1975) (most-favored-purchaser provision lawful); *United States* v. *Birdsboro Steel Foundry and Machine Co.*, 139 F. Supp. 244 (W.D. Pa. 1956) (licensing of future patents not *per se* unlawful); *Imperial Chemical Industries, Ltd.* v. *National Distillers & Chemical Corp.*, 342 F.2d 737 (2d Cir. 1964); *United States* v. *Imperial Chemical Industries, Ltd.*, 254 F. Supp. 685, 692 (S.D.N.Y. 1966) (dictum) (restriction on publicity of trade secret not illegal *per se*). *See generally*, U.S. Department of Justice, *Antitrust Guide Concerning Research Joint Ventures* (1980) (hereinafter, *Antitrust Guide*).

22/ *E.g.*, *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 83 (1950); *In re Yarn Processing Patent Availability* Litigation, 541 F.2d 1127, 1136 (5th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977) (pervasive use of most-favored-purchaser provision *per se* unlawful). *See also Antitrust Guide*, *supra*, 11-12, 19-21. For example, because of their sheer size, economic power, and substantial capacity and incentive for independent

(Footnote *22*/ continued on next page.)

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The point is that these four types of restraints are not so plainly anticompetitive in all circumstances that they should be condemned in perpetuity without reference to the peculiar facts of each case. To ban all such agreements outright, as the Judgment in many respects does, may deny the public the benefit of what might otherwise prove to be a procompetitive arrangement.

It is anticipated that the proposed relaxation of these injunctive restraints, coupled with vigilant case-by-case review of any such agreement into which the defendants subsequently enter, might have the following procompetitive effects: (a) actual competition in research, development and sale of motor vehicle emission control devices might be en-

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(Footnote 22/ continued.)

development efforts, if General Motors and Ford entered into any sort of arrangement to jointly assess the value of third party patent rights, the United States would be inclined to take action under the antitrust laws or the decree. Such an arrangement smacks of price-fixing. Whatever possible benefits it could have would probably be outweighed by all the varieties of economic inefficiency and waste which invariably attend price-fixing arrangements. United States v. Topco Associates, Inc., 405 U.S. 596, 609-612 (1972). On the other hand, a similar agreement between two smaller defendants with less capability for independent research and development efforts might pass antitrust muster.

hanced by permitting entry into certain potentially competitive arrangements from which the defendant manufacturers are currently excluded; (b) economic incentives might be created for less capable defendants to concentrate on independent lines of research and development (rather than duplicating the successful research efforts of others), thereby increasing the diversity of competition in the markets for emission control devices; and (c) potential and actual competition in development and sale of motor vehicles might be stimulated, since any savings resulting from joint arrangements could be reinvested in new product development.

No adverse competitive impact would result from deleting those decree provisions which dismantled the AMA cross-licensing agreement or which relate to the now-expired restrictions on defendants' exchanges of restricted information and presentation of joint statements. Those provisions no longer have any force or effect.

Finally, bringing this matter to a conclusion five years after the entry of the proposed modification is not likely to have any adverse competitive effect. The original Judgment, entered over a decade ago, sought to undo the effects of an alleged violation and prevent its recurrence. Many of its objectives have already been accomplished. It is reasonable to expect that an additional five years is sufficient for the accomplishment of any that remain unfulfilled. Laws of general applicability will sufficiently

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protect the public against any future anticompetitive conduct once the Modified Judgment has expired.

In consenting to a modification and eventual termination of this Final Judgment, the United States does not intend to sanction any future agreement which has the purpose or effect of delaying, limiting or retarding research, development, installation or sale of emission control devices, and nothing in the proposed modification would provide any such sanction. 23/ Indeed, the United States would not hesitate to initiate a criminal action against any future agreement that significantly impedes progress in this area. This modification merely recognizes that the passage of time since the original conspiracy, the availability of stiff criminal fines and prison terms for conviction upon any new antitrust violation, and the potentially over-restrictive effect of certain perpetual judgment provisions are all factors which indicate that a continuation of the Judgment in its present form is no longer required.

V. REMEDIES AVAILABLE TO POTENTIAL PRIVATE PLAINTIFFS

The proposed modification was not precipitated by any alleged violation of the antitrust laws. Consequently, it is not believed that there are any potential private plaintiffs. However, assuming that such plaintiffs do exist, they will retain the same legal rights which they would have had if

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23/ See Modified Judgment, §§IV(A), (B)(1) and (2).

the proposed modification were not entered. The Modified Final Judgment may not be used as prima facie evidence in private litigation pursuant to Section 5(a) of the Clayton Act, 15 U.S.C. §15(a).

VI. PROCEDURES AVAILABLE FOR FUTURE MODIFICATION OF THE MODIFIED FINAL JUDGMENT

The proposed Modified Final Judgment is subject to a stipulation between the parties which provides that the United States may withdraw its consent at any time before the Court has entered the modification. During the sixty (60) day statutory period, any person may submit written comments to:

Bernard M. Hollander, Chief
Judgment Enforcement Section
Antitrust Division
United States Department
of Justice
Washington, D.C. 20530

The Department of Justice will, prior to entry of the proposed Modified Final Judgment, evaluate all such comments and determine whether there is any reason to withdraw its consent. Such comments and the Antitrust Division's responses thereto will be filed with the Court and published in the Federal Register.

Upon entry of the proposed Modified Final Judgment, the Court retains jurisdiction to enforce it and to enable the parties to apply for construction or modification of any of its provisions.

VII. ALTERNATIVES CONSIDERED BY THE UNITED STATES

After reviewing the Judgment, the United States was persuaded that its modification would be in the public interest.

No other course was considered.

As an alternative to allowing Sections IV(A)(2)(a) and (g) to expire, the United States considered whether an evidentiary hearing would likely result in their extension. However, because support for such an extension had significantly diminished during the period of the Government's appeal, it was decided that the motion for extension could not be sustained.

VIII. DETERMINATIVE DOCUMENTS

There were no materials or documents considered determinativ in formulating the proposed modification or in deciding to permit expiration of Sections IV(A)(2)(a) and (g).

Dated: February 8, 1982

Bernard M Hollander
Bernard M. Hollander

Gregory B. Hovendon

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Attorneys for the United States

EXHIBIT 1

ACTIONS TO HELP THE U.S. AUTO INDUSTRY

APRIL 6, 1981

THE WHITE HOUSE

Office of the Press Secretary

April 6, 1981

FACT SHEET

President Reagan's Program for the U.S. Automobile Industry

Promptly after taking office, President Reagan appointed a Cabinet-level Task Force to examine the problems of the U.S. auto industry. Based on the advice of the Task Force and other Presidential advisers, he has adopted a positive program to address directly the immediate problems of depressed sales, record losses, and severe unemployment. The program also addresses the industry's critical longer term needs to offer new competitive models and to reduce unit costs.

BACKGROUND ON THE AUTO INDUSTRY

The Situation is Serious

- In 1980 a stagnant and inflationary economy reduced sales of U.S.-made cars to the lowest point in 19 years. Compared with only three years earlier, total auto sales (domestic and imported) were down 20 percent, and sales of light trucks and vans were down 35 percent.
- The domestic companies incurred unprecedented losses of $4.3 billion in 1980.
- The downturn in auto sales has exacted a severe human toll. Over 180,000 auto workers are on indefinite layoff, 300,000 more are estimated to be unemployed in supplier industries, and another 100,000 are out of work in the dealer network.

The Problems are Longer Term as well as Cyclical

- Not only are sales depressed because of the stagnant economy, but the U.S. auto industry has experienced a dramatic change in its markets, induced by escalating energy prices. As gasoline increased from 70¢ per gallon in January 1979 to $1.35 per gallon in February 1981, consumer demand shifted dramatically to small cars. Partly as a result, imports increased from 18 percent to 28 percent of all auto sales during that same period.

EXHIBIT 1

- The auto industry is also burdened with stringent regulatory requirements which add hundreds of dollars to the cost of each vehicle and billions to the industry's capital requirements. Regulation also diverts engineering and managerial talent from the industry's adjustment problems.

The Industry Retains Tremendous Strengths

- Despite its unprecedented problems, the U.S. auto industry has tremendous economic and competitive strengths. It is now engaged in a $70-$80 billion program of new investment to modernize its plants and make its products more competitive. This program has already resulted in lower production costs and the introduction of technologically advanced, fuel-efficient, front-wheel drive models.

To address the problems and exploit the strengths of this important sector of our economy, the President has adopted a program of economic recovery, regulatory relief, and other important measures.

THE ECONOMIC RECOVERY PROGRAM

The cornerstone of the President's initiative for the auto industry is his Economic Recovery Program, including spending cuts, tax reforms, and general regulatory relief. There is simply no doubt that revitalization of the economy is the single most important remedy for the auto industry's problems.

Stimulating Sales, Profits, and Jobs

The Economic Recovery Program will provide immediate relief to the industry by stimulating the sales of new cars and trucks:

- Renewed growth in real incomes and higher employment will give consumers added income to buy new cars.

- Reduced interest rates will lower the costs of automobile financing, further encouraging new car sales.

- The investment tax credit provided under the Accelerated Cost Recovery System will increase commercial and fleet purchases of new cars and trucks.

- A stable economic environment will renew consumer confidence and encourage individuals who have deferred purchases in recent years to buy new cars and trucks.

EXHIBIT 1

The sales recovery induced by the President's program will improve the industry's financial condition and restore job opportunities:

- Sales of new cars (foreign and domestic) should rise from approximately 9 million units in 1980 to 11 million units by 1982 and 12 million by 1983; truck sales should show similar growth.
- Since every 500,000 units of additional car or truck sales generate nearly $1 billion in additional net operating income, by 1983 this should amount to an additional $6 billion per year (before taxes) for U.S. auto makers.
- Increased production should permit the rehiring of most unemployed auto workers by the end of 1982.

Improving Productivity and Lowering Unit Costs

Over the longer term, the most important effect of the Economic Recovery Program will be to reduce production costs, thereby improving the industry's international competitive position:

- Higher production volumes will mean lower unit costs due to economies of scale.
- Lower inflation rates and reduced federal borrowing will lower the cost to the industry of capital necessary for plant modernization.
- Tax reductions for individual taxpayers and lower rates of inflation should also moderate pressures for costly wage settlements and contribute to a more stable environment for collective bargaining and labor relations.

REGULATORY RELIEF

President Reagan is committed to reducing the excessive burdens of regulation throughout the economy and has established a Task Force on Regulatory Relief, chaired by the Vice President, to oversee that process. The Presidential Task Force and the Executive branch regulatory agencies will give high priority to relief for the auto industry. These measures will result in considerable savings in capital costs to the industry and even greater savings to consumers.

The President recognizes the importance of protecting health, safety, and the environment. Nevertheless, some of the regulations governing the auto industry's plants and products are unnecessarily stringent, and can be relaxed or rescinded with little or no cost to worthwhile regulatory goals. Other regulations now pending may be needed over the long run, but can be safely postponed until the industry has completed its structural adaptation.

Regulatory relief will benefit the auto industry and its customers by:

- Reducing substantially the cost of producing and operating a new car or truck. This will not only benefit consumers but further stimulate sales.
- Freeing capital needed for essential investments in new plant and equipment.
- Improving U.S. manufacturers' international competitive position.

Working together, the Auto Industry Task Force, the Presidential Task Force on Regulatory Relief, and the major regulatory agencies have developed a four-part program:

(1) 34 Specific Regulatory Actions

The Acting Administrators of the Environmental Protection Agency (EPA) and the National Highway Traffic Safety Administration (NHTSA) have today submitted to the *Federal Register* notices of intent to rescind, revise, or repropose a total of 34 specific regulations. EPA and NHTSA estimate that over the next five years these actions would save the auto industry more than $1.3 billion in capital that can be used instead for needed plant modernization. In addition, these actions will save consumers more than $8.0 billion over the next five years. The actions are described in considerable detail in the attachment.

(2) Statutory Requirements for High Altitude Emissions

As part of the proposed amendments to the Clean Air Act, EPA will ask Congress to eliminate the requirement that all passenger cars meet 1984 emissions standards at high altitudes. This action alone would save $38 million in capital costs and $1.3 billion in consumer costs over five years.

As shown in the table below, the combined savings generated by this legislative change and by the 34 specific regulatory actions just described amount to $1.4 billion in capital costs and $9.3 billion in consumer costs, or about $150 per car or truck.

Savings from Actions to be Taken by EPA and NHTSA
($ billions over 5 years)

Agency	Capital	Consumer
EPA	$0.8	$4.3
NHTSA	0.6	5.0
Total	$1.4	$9.3

(Estimates include savings for high altitude requirements and for 27 of 34 regulatory actions; estimated savings on remaining 7 actions are not available. Source of estimates: EPA and NHTSA (industry estimates typically run much higher).)

(3) Regulations Earmarked for More Intensive Review

EPA and NHTSA have identified additional regulations on which immediate action is not possible, but which are important candidates for regulatory relief. These regulations, also listed in the attachment, will be reviewed to see whether they should be revised or rescinded.

(4) Longer Range Reforms

The President's program to reduce the regulatory burden on the auto industry will be expanded to include:

- Regulations administered by executive agencies other than EPA and NHTSA.
- Regulations where potential cost savings are not as immediate as the other announced actions.
- Additional changes in the Clean Air Act and other basic regulatory statutes.

OTHER POLICY INITIATIVES

The President's program of economic recovery and regulatory relief will materially improve the condition of the U.S. auto industry, but more can--and will--be done to reinvigorate this industry:

Antitrust

- The President has asked the Attorney General to expedite consideration of the industry's request to vacate the 1969 "smog decree" as soon as a pending appeal has been concluded. The decree prohibits certain joint statements by the industry to governmental agencies concerned with auto emission and safety standards and exchanges of certain technical information on emission control devices.
- The Department of Transportation (NHTSA) will waive the prohibition on joint submissions on all of its future regulatory initiatives.
- EPA will adopt a liberal waiver policy and consider requests to make joint statements on a case-by-case basis.
- The Federal Trade Commission has on its own initiative withdrawn subpoenas for records in its long-standing investigation of the auto industry. The FTC has concluded that substantial changes in the industry have occurred since the investigation began in 1976.

Labor

- The Department of Labor is proposing to provide increased assistance to displaced auto workers by restructuring Federal programs for retraining and relocation through the existing employment and training delivery system.

Accelerated Federal Procurements

- The Administration is proposing to accelerate the Federal procurement of motor vehicles by $100 million in the current fiscal year, an action which would also reduce operating costs of the federal automobile fleet.

. . . .

In summary, the President's program addresses those fundamental problems of the industry fostered by the Government itself, thereby restoring needed sales, jobs, and profitability in the short term, while also encouraging the retooling, productivity improvements, and cost reductions that are critical for the industry over the longer term.

EXHIBIT 1

ATTACHMENT:

REGULATORY RELIEF FOR THE AUTO INDUSTRY

Page

Actions Taken by the Environmental Protection Agency (EPA)

Notice of Intent Transmitted to *Federal Register* A-2

Fact Sheets on Individual Actions A-9

List of Items for Further Study A-27

Actions Taken by the National Highway Traffic Safety Administration (NHTSA)

Notice of Intent Transmitted to *Federal Register* A-29

Fact Sheets on Individual Actions A-39

List of Items for Further Study A-58

Summary Table on Individual Actions A-59

EXHIBIT 1

Attachment, pp. A-2 through A-58, have been deleted from Exhibit. Material was published in previous issues of the *Federal Register*.

EXHIBIT 1

SUMMARY TABLE ON

INDIVIDUAL EPA AND NHTSA ACTIONS
Summary Table

Potential Savings From Proposed Actions

gency Action	Five Year Savings* Capital (millions of dollars)	Five Year Savings* Consumer (millions of dollars)	Comments
PA			
elax the statutory HC and CO tandards for heavy trucks	108	536	Industry says that this action would save $110 million. General Motors estimates $900 per engine in consumer savings.
alax the 10 percent AQL to 40 ercent for light and heavy trucks	19	129	International Harvester estimates it will save $14 million by this action.
elay assembly line testing for eavy trucks	57	64	Chrysler claims a savings of $3 million for this change; General Motors $44 million, International Harvester $22 million.
elax the NO_x level for heavy trucks	150	563	
missions averaging for diesel articulate emissions	40	523	
liminate 1984 high altitude auto mission standards	38	1,300	Requires amendment to Clean Air Act. Ford estimates that this change will save them about $56 million with a savings to consumers of $500 million.
dopt self-certification for vehicles sold at high altitude	1	1	Would save manufacturers the time and expense of transporting test cars to high altitude areas and eliminate scheduling problems.
ot requiring use of onboard control technology for refueling emissions	103	1,200	Industry says that this action would save consumers $1.5 billion.
educe the annual number of ssembly line test orders	1	1	
xplore deferring standards for aint shops	300	---	Unable to estimate savings to consumer as action by states is unknown.
Savings from EPA Actions	817	4,317	

EXHIBIT 1

Agency Action*	Five Year Savings Capital (millions of dollars)	Five Year Savings Consumer (millions of dollars)	Comments
NHTSA			
Delay First Year Implementation of Passive Restraint Standard	30	105	Additional savings of as much as $600 million in investments and $1 billion annually in consumer costs are possible, depending on subsequent action taken by the Department.
Modify bumper standard	---	3,250	Some capital costs required to modify standard.
Rescind fields of direct view	174	85	Capital investment estimates are by GM and Ford.
All Other NHTSA Actions	352	1,540	
Savings from NHTSA Actions	556	4,980	
Total Savings (EPA and NHTSA)	1,373	9,297	About $150 per car and truck in potential consumer savings.

EXHIBIT 1

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*In addition to these savings, the notices of intent identify 7 other actions (plus a number of other longer term initiatives) that will result in further regulatory relief but for which estimates of savings are not available. The savings estimates shown in this table are in 1981 dollars and are undiscounted 5-year cumulative totals.

EXHIBIT 2

US Department
of Transportation

National Highway
Traffic Safety
Administration

The Administrator

400 Seventh Street, S.W.
Washington, D.C. 20590

AUG 17 1981

Mr. V. J. Adduci
President and
Chief Executive Officer
Motor Vehicle Manufacturers Association
1909 K Street, N.W., Suite 300
Washington, D.C. 20006

Dear Mr. Adduci:

This responds to your recent letter asking the National Highway Traffic Safety Administration (NHTSA) to recommend to the Department of Justice (DOJ) that it vacate the provision of the emission control consent decree that prohibits the submission of joint comments to NHTSA. Further, you ask that the agency by letter waive that provision for purposes of your member companies.

NHTSA is a minor participant in the consent decree relating to emission control devices. The major participants are DOJ, the Environmental Protection Agency and the manufacturers. I have already indicated to DOJ that this agency would not be impaired should the provisions of the consent decree relating to joint comments on safety standards be vacated. This is in line with our regulatory philosophy of reducing unnecessary restrictions upon the industry. I am sending a copy of this letter to DOJ to reiterate my position on this issue.

As you correctly note, this agency has already indicated its intention to authorize joint statements by the defendants in United States of America v. Automobile Manufacturers Association, Inc., as provided in section IV(A)(2)(g) of the consent decree entered in that case. I agree that this step should be taken forthwith. By this letter, I authorize those parties to submit joint comments on any subject relating to Federal motor vehicle safety standards and regulations, including ". . . the ability of one or more of the defendants to comply with a particular standard or regulation or to do so by a particular time . . ." This authorization becomes effective on the date of this letter. Further, as provided in that section of the decree, I request that any defendant joining in a joint statement on any rulemaking notice concerning a Federal motor vehicle safety standard or regulation also file an individual statement on that notice.

Sincerely,

Raymond A. Peck, Jr.

Administrator

cc: Anthony Harris
U.S. Department of Justice
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Appellee Motor Vehicle
Manufacturers Assoc. of the
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CERTIFICATE OF SERVICE

I, Anthony E. Harris, hereby certify that on February 12, 1982, I mailed copies of the foregoing Stipulation and Competitive Impact Statement in duly-addressed, franked envelopes, to be delivered to the following addressees:

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)
Plaintiff,)
v.) Civil Action No. 69-75-JWC
AUTOMOBILE MANUFACTURERS ASSOCIATION, INC; GENERAL MOTORS CORPORATION; FORD MOTOR COMPANY; CHRYSLER CORPORATION; and AMERICAN MOTORS CORPORATION,)
Defendants.)

STIPULATION FOR ENTRY OF CONSENT JUDGMENT

FILED: September 11, 1969
(FINAL JUDGMENT ENTERED 10/29/69)

Civ. 69-75-JWC

IT IS STIPULATED by and between the undersigned parties, by their respective attorneys, that:

(1) The parties consent that a Final Judgment in the form hereto attached may be filed and entered by the Court at any time after the expiration of thirty (30) days following the date of filing of this Stipulation without further notice to any party or other proceedings, either upon the motion of any party or upon the Court's own motion, provided that plaintiff has not withdrawn its consent as provided herein;

(2) The plaintiff may withdraw its consent hereto at any time within said period of thirty (30) days by serving notice thereof upon the other parties hereto and filing said notice with the Court;

(3) In the event plaintiff withdraws its consent hereto, this Stipulation shall be of no effect whatever in this or any other proceeding and the making of this Stipulation shall not in any manner prejudice any consenting party in any subsequent proceedings.

Dated: September 11, 1969

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UNITED STATES OF AMERICA:

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Assistant Attorney General

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.) Civil Action No. 69-75-JWC
)
AUTOMOBILE MANUFACTURERS)
ASSOCIATION, INC.;) ENTERED: October 29, 1969
GENERAL MOTORS CORPORATION;)
FORD MOTOR COMPANY;)
CHRYSLER CORPORATION; and)
AMERICAN MOTORS CORPORATION,)
)
Defendants.)

FINAL JUDGMENT

The plaintiff, United States of America, having filed its complaint herein on January 10, 1969, and the plaintiff and the defendants by their respective attorneys having severally consented to the entry of this Final Judgment without trial or adjudication of or finding on any issues of fact or law herein and without this Final Judgment constituting evidence or an admission by any of them in respect to any such issue;

NOW, THEREFORE, before any testimony has been taken and without trial or adjudication of or finding on any issue of fact or law herein, and upon consent of the parties as aforesaid, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

This Court has jurisdiction of the subject matter herein and of the parties hereto. The complaint states a claim upon which relief may be granted against the defendants under Section 1 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Antitrust Act, as amended.

II

As used in this Final Judgment:

(A) "Devices" means air pollution emission control designs, devices, equipment, methods, or parts thereof, for motor vehicles.

(B) "Restricted information" means all unpublished information of the type usually classified as company confidential concerning applied as distinguished from basic research in, or concerning the development, innovation, manufacture, use, sale or installation of Devices. It includes trade secrets, unpublished company policy, and other unpublished technical information for developing, making, improving, or lowering the cost of, Devices by a motor vehicle manufacturer. "Restricted information" shall not mean (i) information concerning basic research in gaining a fuller knowledge or understanding of the presence, nature, amount, causes, sources, effects or theories of control of motor vehicle emissions in the atmosphere, or (ii) information relating primarily to equipment, methods or procedures for the testing or measurement of Devices, or (iii) information for or resulting from the testing or measurement of production prototypes of Devices of an advanced stage exchanged solely for such purposes. Information shall be deemed to be published when it is disclosed without restriction to the public, or to media of general circulation, or to the trade press, or to meetings of stockholders, dealers, or financial analysts, or to meetings of professional, scientific or engineering societies, or committees thereof, the membership of which is not limited to persons employed by defendants or by motor vehicle manufacturers, or to meetings called by representatives of Federal, state or local governments or agencies authorized to issue motor vehicle emission control regulations.

III

The provisions of this Final Judgment shall be binding upon each defendant and upon each of its subsidiaries, officers, directors, agents, servants, employees, successors and assigns, and upon all other persons in active concert or participation with any of them who shall have received actual notice of this Final Judgment by personal service or otherwise, but shall not apply to any transaction between or among a parent company, its subsidiaries, officers, directors, agents, servants and/or employees. Nothing in this Final Judgment shall have any effect with respect to any activities outside the United States which do not adversely and substantially affect the foreign commerce of the United States.

IV

(A) Each defendant is enjoined and restrained from:

(1) Combining or conspiring to prevent, restrain or limit the development, manufacture, installation, distribution or sale of Devices;

(2) Entering into, adhering to, enforcing or claiming any rights under any provisions of any agreement, arrangement, understanding, plan or program (hereinafter "agreement") with any other defendant or manufacturer of motor vehicles or Devices:

(a) to exchange restricted information;

(b) to cross-license patents or patent rights on Devices which cross-license includes patents or patent rights acquired subsequent to the date of any such cross-license;

(c) to delay installation of Devices or otherwise restrain individual decisions as to installation dates;

(d) to restrict publicity of research and development relating to Devices;

(e) to employ joint assessment of the value of patents or patent rights of any third party relating to Devices;

(f) to require that acquisition of patent rights relating to Devices be conditioned upon availability of such rights to others upon a most-favored-purchaser basis;

(g) to file, in the absence of a written authorization for a joint statement by the agency involved, with any governmental regulatory agency in the United States authorized to issue emission standards or regulations for new motor vehicles or Federal motor vehicle safety standards or regulations, any joint statement regarding such standards or regulations except joint statements relating to (i) the authority of the agency involved, (ii) the draftsmanship of or the scientific need for standards or regulations, (iii) test procedures or test data relevant to standards or regulations, or (iv) the general engineering requirements of standards or regulations based upon publicly available information; provided that no joint statement shall be filed which discusses the ability of one or more defendants to comply with a particular standard or regulation or to do so by a particular time, in the absence of a written agency authorization for such a joint statement, and provided also that any defendant joining in a joint statement shall also file a statement individually upon written request by the agency involved; or

(h) not to file individual statements with any governmental regulatory agency in the United States authorized to issue emission standards or regulations for new motor vehicles or Federal motor vehicle safety standards or regulations.

(B) Nothing in this Final Judgment shall prohibit any defendant:

(1) from furnishing or acquiring any restricted information for the defense or prosecution of any litigation or claim;

(2) from entering into or performing under any otherwise lawful agreement with any other person or conducting bona fide negotiations looking to any such agreement:

(a) for the purchase or sale of specific commercial products;

(b) for the license of specific existing patent rights or from including in any such agreement provision for a nonexclusive grant-back of patent rights on improvements obtained by the licensee during the term of the license or a reasonable period thereafter; or

(c) for the purchase, sale or license of specific existing restricted information or specific engineering services relating to Devices or from including in any such agreement provision for a nonexclusive grant-back of patent rights on improvements obtained by the licensee during the term of the license or a reasonable period thereafter;

or from furnishing or acquiring any restricted information directly relating thereto;

(3) from entering into, renewing or performing under any otherwise lawful agreement with any non-

defendant person, firm or corporation that does not account for more than 2% of world production of motor vehicle passenger car, truck and bus units in the calendar year preceding the entering into or renewing such agreement (See Appendix A); or

(4) from entering into, renewing or performing under any agreement which is submitted in writing to the plaintiff and to which plaintiff consents in writing.

(C) Nothing in Section IV(A)(2)(a) shall prohibit any defendant from engaging in any activity outside the United States reasonably necessary:

(1) to the development of, response to, or compliance with existing or proposed vehicle emission laws, regulations or standards of a foreign governmental body, or

(2) to the performance under any otherwise lawful agreement for the production of motor vehicles outside the United States with any person, firm or corporation not engaged in the production of motor vehicles in the United States at the time of entering into or renewing such agreement.

V

(A) Each manufacturing defendant is ordered and directed to exercise its right to withdraw from the AMA cross-licensing agreement of July 1, 1955, as amended, and to take such steps as are necessary to accomplish said withdrawal within one hundred twenty (120) days from the date of entry of this Final Judgment. Notwithstanding such withdrawal defendants may continue to exercise those rights and claims relating to royalty-free licenses under the cross-licensing agreement which have accrued up to the date of entry of this Final Judgment.

(B) Defendant AMA is ordered and directed to relinquish its responsibilities under the AMA cross-licensing agreement of July 1, 1955, as amended, within sixty (60) days from the date of entry of this Final Judgment.

VI

(A) Upon written request therefor and subject to the conditions set forth herein:

(1) Each manufacturing defendant is ordered and directed to grant to any person to the extent that it has the power to do so a nonexclusive, non-transferable and royalty-free license to make, have made, use, lease or sell Devices under any claim of any United States patent or any United States patent application owned or controlled by said defendant or under which it has sublicensing rights, which patent was issued or application was filed prior to the date of entry of this Final Judgment and licensed under the AMA cross-licensing agreement of July 1, 1955, as amended, provided that if the manufacturing defendant is obligated to pay royalties to another on the sales of the licensee the license under this paragraph may provide for the payment of those same royalties to the defendant;

(2) Each manufacturing defendant shall grant to any licensee under (1) above, to the extent that it has the power to do so, an immunity from suit under any foreign counterpart patent or patent application for any product manufactured in the United States under the license for sale abroad or for any product manufactured abroad and sold in the United States, provided that if the manufacturing defendant is obligated to pay royalties to another on the sales of the licensee the license may provide for the payment of those same royalties to the defendant; and

(3) Defendant AMA is ordered and directed to make available for examination and copying by any person the technical reports in its possession or control prepared or exchanged by defendants pursuant to said cross-license within two years prior to the entry of this Final Judgment, which are identified in Appendix B.

(B) Any existing licensee of any manufacturing defendant shall have the right to apply for and receive a license or licenses under this Final Judgment in substitution for its existing license or licenses from any manufacturing defendant, insofar as future obligations and licenses are concerned. Any licensee shall be free to contest the validity and scope of any licensed patent.

VII

Defendant AMA is ordered and directed to mail a copy of this Final Judgment to all signatories to the AMA cross-licensing agreement of July 1, 1955, as amended, and to all known domestic manufacturers of motor vehicles and motor vehicle engines within thirty (30) days from the date of entry of this Final Judgment, and to issue a press release to the domestic trade and business press relating the substance of the Final Judgment.

VIII

For the purpose of determining or securing compliance with this Final Judgment, duly-authorized representatives of the Department of Justice shall, upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant made to its principal office, be permitted, subject to any legally recognized privilege, access during the office hours of said defendant to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of said defendant relating to any matters contained in this Final

Judgment, and subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of said defendant, who may have counsel present, regarding any such matters. Said defendant, upon the written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, shall submit such written reports with respect to any of the matters contained in this Final Judgment as from time to time may be requested. No information obtained by the means provided in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

IX

Section IV(A)(2)(a) and (g) of this Final Judgment shall expire ten years after the date of entry hereof, provided that plaintiff may apply to this Court for the continuation of one or both of said provisions, such application to be made not later than nine years after the date of entry of this Final Judgment.

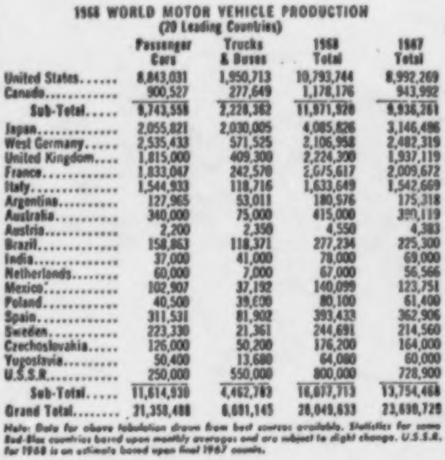
X

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate in relating to the construction of or carrying out of this Final Judgment, for the modification or vacating of any of the provisions thereof, and for the purpose of the enforcement of compliance therewith and the punishment of violations thereof.

Dated: October 29, 1969

/s/ JESSE W. CURTIS
Jesse W. Curtis
United States District Judge

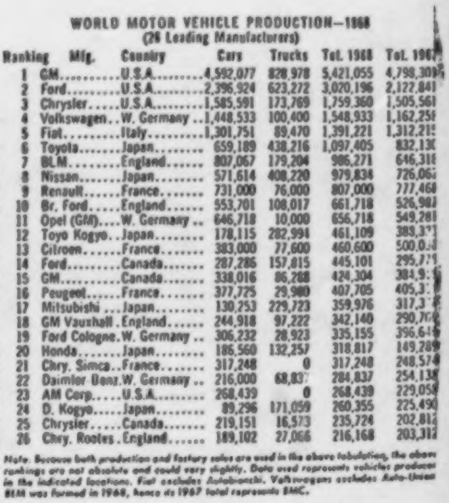
Section IV(B)(3) of this judgment was prepared in reliance on the motor vehicle production statistics set forth in the following tables contained in Ward's 1969 Automotive Yearbook (31st edition) published by Powers and Company, Inc., Detroit, Michigan, at page 14:



1968 WORLD MOTOR VEHICLE PRODUCTION
(20 Leading Countries)

	Passenger Cars	Trucks & Buses	1968 Total	1967 Total
United States	8,843,031	1,950,713	10,793,744	8,992,269
Canada	900,527	277,649	1,178,176	943,992
Sub-Total	9,743,558	2,228,362	11,971,920	9,936,261
Japan	2,055,821	2,030,005	4,085,826	3,146,486
West Germany	2,535,433	571,525	2,106,958	2,482,319
United Kingdom	1,815,000	409,300	2,224,300	1,937,119
France	1,833,047	242,570	2,075,617	2,009,672
Italy	1,544,933	118,716	1,633,649	1,542,669
Argentina	127,965	53,011	180,976	175,318
Australia	340,000	75,000	415,000	390,119
Austria	2,200	2,350	4,550	4,383
Brazil	158,863	118,371	277,234	225,300
India	37,000	41,000	78,000	69,000
Netherlands	60,000	7,000	67,000	56,566
Mexico	102,907	37,192	140,099	123,751
Poland	40,500	39,600	80,100	61,400
Spain	311,531	81,902	393,433	362,906
Sweden	223,330	21,361	244,691	214,560
Czechoslovakia	126,000	50,200	176,200	164,000
Yugoslavia	50,400	13,680	64,080	60,000
U.S.S.R.	250,000	550,000	800,000	728,900
Sub-Total	11,614,930	4,462,783	16,077,713	13,754,468
Grand Total	21,358,488	6,691,145	28,049,633	23,690,729

Note: Data for above tabulation drawn from best sources available. Statistics for some Red-Bloc countries based upon monthly averages and are subject to slight change. U.S.S.R. for 1968 is an estimate based upon final 1967 counts.



WORLD MOTOR VEHICLE PRODUCTION—1968
(26 Leading Manufacturers)

Ranking	Mfg.	Country	Cars	Trucks	Tot. 1968	Tot. 1967
1	GM	U.S.A.	4,592,077	828,978	5,421,055	4,798,30
2	Ford	U.S.A.	2,396,924	623,272	3,020,196	2,122,841
3	Chrysler	U.S.A.	1,585,591	173,769	1,759,360	1,505,561
4	Volkswagen	W. Germany	1,448,533	100,400	1,548,933	1,162,25
5	Fiat	Italy	1,301,751	89,470	1,391,221	1,312,21
6	Toyota	Japan	659,189	438,216	1,097,405	832,13
7	BLM	England	807,067	179,204	986,271	646,31
8	Nissan	Japan	571,614	408,220	979,834	726,06
9	Renault	France	731,000	76,000	807,000	777,46
10	Br. Ford	England	553,701	108,017	661,718	526,98
11	Opel (GM)	W. Germany	646,718	10,000	656,718	549,281
12	Toyo Kogyo	Japan	178,115	282,994	461,109	383,3
13	Citroen	France	383,000	77,600	460,600	500,0
14	Ford	Canada	287,286	157,815	445,101	295,7
15	GM	Canada	338,016	86,288	424,304	384,9
16	Peugeot	France	377,725	29,980	407,705	405,3
17	Mitsubishi	Japan	130,253	229,723	359,976	317,3
18	GM Vauxhall	England	244,918	97,222	342,140	290,7
19	Ford Cologne	W. Germany	306,232	28,923	335,155	396,6
20	Honda	Japan	186,560	132,257	318,817	149,28
21	Chry. Simca	France	317,248	0	317,248	248,57
22	Daimler Benz	W. Germany	216,000	68,837	284,837	254,13
23	AM Corp.	U.S.A.	268,439	0	268,439	229,05
24	D. Kogyo	Japan	89,296	171,059	260,355	225,49
25	Chrysler	Canada	219,151	16,573	235,724	202,81
26	Chry. Rootes	England	189,102	27,066	216,168	203,31

Note: Because both production and factory sales are used in the above tabulation, the above rankings are not absolute and could vary slightly. Data used represents vehicles produced in the indicated locations. Fiat excludes Autobianchi. Volkswagen excludes Auto-Union. BLM was formed in 1968, hence its 1967 total represents BMC.

It is contemplated by the parties that Ward's Automotive Yearbook or any successor publication will be the source of the statistics necessary to the future interpretation of the provisions of Section IV(B)(3).

APPENDIX A

Pursuant to Section VI(A)(3) of the Final Judgment the following technical reports are identified:

Subcommittee Reports to
The Vehicle Combustion Products Committee
January 1968

1. Atmospheric Chemistry Panel Report
2. Diesel Emission Panel Report
    - a) Proposed Standards for Motor Vehicle Exhaust Odor and Irritation - California Department of Public Health Bureau of Air Sanitation - March 1, 1966 - 8 pages
    - b) Proposed Additions to the California Administrative Code - Standards for Motor Vehicle Emissions, State Board of Public Health Meeting June 10, 1966 - prepared by the State of California Department of Public Health - May 4, 1966 - 6 pages
3. Ad Hoc Engine Deposits Panel Report
    - a) A Proposed Program to Establish the Effect of Combustion Chamber Deposits on Exhaust Emissions - prepared by Engine Deposit Panel - January 3, 1967 - 19 pages
    - b) Proposed Joint AMA - API Engine Deposits Program - September 14, 1967 - 7 pages
4. Engine and Vehicle Modification Panel Report
5. Exhaust Emission Measurement Panel Report
    - a) EEMP - Status Report on Future Exhaust Emission Standards - undated - 8 pages
6. Ad Hoc Group on Exhaust System Heat Report
7. Fuel System Emission Panel Report
    - a) FSEP - Report of Fuel System Emission Panel to VCP - July 20, 1967 - 9 pages
    - b) AMC Evaporation Systems - undated - 6 pages
    - c) Chrysler Closed Vent System - C.V.S. - prepared by Chrysler - undated - 8 pages
    - d) Crankcase Storage of Evaporative Emissions - prepared by General Motors Corp. - October 25, 1967 - 9 pages

APPENDIX B

e) Charcoal Canister Evaporative Emission Control System - prepared by General Motors Corp. - October 25, 1967 - 9 pages

f) History of Evaporative Control Studies - prepared by Ford Motor Company - December 1, 1967 - 12 pages

g) Crankcase Storage System for Control of Fuel Evaporative Emissions - prepared by Ford Motor Company - December 1, 1967 - 14 pages

h) Carbon Air Cleaner Evaporative Control System - prepared by Ford Motor Company - December 1, 1967 - 9 pages

8. Ad Hoc Health Committee Report

9. Heavy Vehicle Panel Report

a) Differences between California and HEW Truck Test Cycles - prepared by Heavy Truck Panel - June 6, 1967 - 3 pages

10. New Devices Committee Report

11. Ad Hoc Traffic Survey Panel Report

a) Comparison of General Durability Schedules - prepared by Ad Hoc Traffic Survey Panel - undated - 1 page

12. Vehicle Emission Surveillance Panel Report

a) Analysis of California Surveillance Data - prepared by the Auto Club of Southern California and Scott Research Laboratories - dated April 20, 1967 - 8 pages

Subcommittee Reports to
The Vehicle Combustion Products Committee
May 23, 1968

1. Atmospheric Chemistry Panel Interim Report

2. Engine and Vehicle Modification Panel Interim Report

3. Exhaust Emission Measurement Panel Interim Report

a) State of California Air Resources Board - Specification for Simplified Instrument Console for Emission Measurements - 13 pages - December 27, 1967

b) State of California Air Resources Board - Test Procedure for Approval of Instruments for Garages, Vehicle Assembly Line and Field Station Use - March 6, 1968 - 8 pages

APPENDIX B

4. Fuel System Emission Panel Interim Report

   a) Laboratory Crosscheck Charts - undated - 5 pages

5. Heavy Vehicle Panel Interim Report

   a) 1969 California Exhaust Emission Standard and Test Procedure for Heavy Trucks contained in the Federal Register publication of January 4, 1968 - 23 pages

6. Ad Hoc Traffic Survey Panel Interim Report

   a) Considerations in Traffic Survey and Test Cycle Development - NCAPC Meeting of March 29, 1968 - prepared by the Ad Hoc Traffic Survey Panel - April 5, 1968 - 2 pages

7. Vehicle Emission Surveillance Panel Interim Report

   a) Hot vs. Cold Start Surveillance Testing - prepared by VESP - March 27, 1968 - 2 pages

   b) VESP Future Surveillance Program - undated - 2 pages

   c) Summary of Analysis - undated - 5 pages

   d) VESP reply letter (draft) to Mr. John Raymond of CMVPCB - May 7, 1968

   e) Effect of Tune-Up - undated - 2 pages

8. Engine and Vehicle Modification Panel Reports

   a) 1970 California Evaporative Control Standard and Test Procedure for Passenger Cars contained in the Federal Register of January 4, 1968 - 23 pages

   b) Intake Valve Throttling (IVT) - A Sonic Throttling Intake Valve Engine - prepared by General Motors for the SAE meeting - May 20-24, 1968 - 11 pages

   c) EVMP - Present Status of Steam Power for Road Vehicles - May 8, 1968 - 11 pages

   d) Preliminary Test Results with Non-Flame After Burner Exhaust Manifold F4-134 cu. in. Engine - prepared by KAISER Jeep CORPORATION - May 8, 1968 - 5 pages

   e) Ad Hoc Subpanel - Valve Timing Proposal Submitted to EVMP - April 9, 1968 - 2 pages

APPENDIX B

Subcommittee Reports to
The Vehicle Combustion Products Committee
September 27, 1968

1. Atmospheric Chemistry Panel Interim Report
2. Diesel Emission Panel Interim Report
3. Engine and Vehicle Modification Panel Interim Report
    a) Report on New Engine Idle Stability - prepared by EVMP members - September 10, 1968 - 18 pages
    b) Driveability Procedure - August 6, 1968 - 8 pages
    c) Vehicle Inspection Procedure for Emission Control Systems and Devices, Gasoline Powered Vehicles -
       Inspection Old Format - August 1, 1967 - 5 pages
       Inspection - New Format - 5 pages
    d) Mass Flow Data - prepared by Chrysler Corporation - September 10, 1968 - 11 pages
    e) EVMP Panel Report on 1968 Engine Idle Setting Procedures - July 10, 1968 Revision including Shop Manual Instructions Furnished by several member companies
    f) EVMP Valve Timing Proposal - undated - 2 pages
    g) Excerpt from EVMP Memorandum Report dated June 11, 1968 on Catalytic Converters and Afterburners - 1 page
    h) Catalytic Converters for Emission Control - prepared by Toyota Motor Company - August 6, 1968 - 8 pages
    i) Ceramic Exhaust Manifold Reactors - prepared by Ford Motor Company - August 5, 1968 - 7 pages
4. Exhaust Emission Measurement Panel Interim Report
    a) Status Report on Assembly Line Testing by EEMP - August 5, 1968 - 2 pages
    b) Report on Measurement Procedure for Nitric Oxide for California - 1970 by EEMP - August 5, 1968 - 16 pages
    c) Report on Exhaust Emission Reactivity Criterion from the Atmospheric Chemistry Panel and the EEMP - July 30, 1968 - 6 pages
    d) Proposal - Exhaust Emission Correlation Program HEW - AMA Laboratories - prepared by EEMP Panel member - October 24, 1967 - 4 pages

APPENDIX B

e) Fast Response Flame Ionization Instrument - letter prepared by Chrysler Corporation - dated June 19, 1968 - 2 pages

f) Bay Toll Crossing Letter - answer sent to Mr. E. R. Foley by Mr. Sherman - August 21, 1968 with attachments - 7 pages

5. Fuel System Emission Panel Interim Report

a) Fuel System Emission Panel report on Proposed Test Procedure for the Determination of Liquid Fuel Losses from Vehicle Fuel Tanks - September 27, 1968 8 pages

b) Fuel System Emission Panel report on Proposed Program for Circulation and Cross-Check of 1970 Evaporative Cars - September 27, 1968 - 2 pages

6. Heavy Vehicle Panel Interim Report

a) Recommended Application Procedure for Certification of New Gasoline Engines for Use in Heavy Duty Vehicles 1970 Model Year - prepared by the National Air Pollution Control Administration - dated September 23, 1968 - 19 pages

7. Ad Hoc Traffic Survey Panel Interim Report

8. Vehicle Emission Surveillance Panel Interim Report

Subcommittee Reports to
The Vehicle Combustion Products Committee
December 10, 1968

1. Atmospheric Chemistry Panel Interim Report

2. Engine & Vehicle Modification Panel Interim Report

a) Driveability Demonstration - prepared by the Driveability Subpanel of EVMP - November 4, 1968 - 14 pages

b) Summary - 1969 Emission Control Systems as presented by the companies to the Engine and Vehicle Modification Panel - undated - 12 pages

c) Comments to ESC by the EVMP on the Feasibility of a Two Minute Emission Inspection System - October 14, 1968 - 3 pages

d) AMA Recommendations in AMA Inspection Handbook, Section IX, Vehicle Control Systems - 5 pages - dated September 10, 1968

APPENDIX B

e) Report of visit to New Jersey Inspection Station November 21, 1968 - by the EVMP - 7 pages

f) Comments to ESC from EVMP on California Proposals for Emission Control Standards on 1970 and Later Model Vehicles - October 21, 1968 - 5 pages

3. Exhaust Emission Measurement Panel Interim Report

a) EEMP comments and Recommendations to AMA ESC on California AB 357 Requirements for Assembly Line Testing for Vehicle Emissions - December 2, 1968 - 10 pages

b) Letter from EEMP of September 6, 1968 to Mr. K. D. Mills at Willow Run and Mr. Mills answer of October 14, 1968 re AMA Exhaust Emission Measurement Correlation Program

c) Fuel System Emission Panel and Heavy Vehicle Panel report to the Emission Standards Committee on Measuring Evaporative Losses - undated - 4 pages

d) Recommended Application Procedure for Certification of New Gasoline Engines for Use in Heavy Duty Vehicles - 1970 Model Year - prepared by National Air Pollution Control Administration - September 23, 1968 - 19 pages

4. Fuel System Emission Panel Interim Report

5. Heavy Vehicle Panel Interim Report

6. Ad Hoc Traffic Survey Panel Interim Report

Subcommittee Reports to
The Vehicle Combustion Products Committee
March 27, 1969

1. Engine & Vehicle Modification Panel Interim Report

2. Exhaust Emission Measurement Panel Interim Report

a) Report from Exhaust Emission Measurement Panel on California ARB proposed Assembly Line Test Procedure for Motor Vehicle Exhaust - January 28, 1969 - 6 pages

b) Effect of Engine Intake Air Moisture on Nitrogen Oxides Emissions - prepared by Ethyl Corporation, March 14, 1969 - 23 pages

c) Humidity Correction K Factor - prepared by Nissan Motor Company - undated - 16 pages

d) Mass Emission Test Procedures - undated - 4 pages

APPENDIX B

e) Effect of Fuel Composition (%Aromatics) on Exhaust Hydrocarbon Concentration - Based Upon DuPont data and a Report by GM dated January 22, 1969 - 5 pages

f) Report on Measurement Procedure for Nitric Oxide for California - 1970 - prepared by EEMP - August 5, 1968 - 16 pages

g) Critique - California AB 690 Test Method for Measuring Vehicle Exhaust Emissions on a Mass Basis - undated - 4 pages

3. Fuel System Emission Panel Interim Report

4. Health Committee Interim Report

5. Heavy Vehicle Panel Interim Report

6. Ad Hoc Traffic Survey Interim Report

Subcommittee Reports to
The Vehicle Combustion Products Committee
June 19, 1969

1. Heavy Vehicle Panel Interim Report

2. Atmospheric Chemistry Panel Interim Report

   a) Exhaust Emission Reactivity Criterion - prepared by the Atmospheric Chemistry Panel and the EEMP - May 28, 1969 - 6 pages

3. Vehicle Emission Surveillance Panel Interim Report

   a) Surveillance Data Summary - prepared by VESP - June 9, 1969 - 5 pages

4. Exhaust Emission Measurement Panel Interim Report

   a) Proposed Items of Discussion on May 12, 1969 at Willow Run - Prepared by Messrs. Mick, Fagley, and Hagen - 8 pages

   b) Analysis of AMA data for HC Emissions during the Federal Cycle - prepared by Ethyl Corporation - June 2, 1969 - 8 pages

   c) Analysis of AMA data for HC Emissions during the California Cycle Tests - Changes to improve Response Time - prepared by Chrysler Corporation - April 29, 1969 - 3 pages

   d) Proposal Exhaust Emission Correlation Program HEW - AMA Laboratories - prepared by Ford Motor Company - April 7, 1969 - 4 pages

APPENDIX B

5. Engine & Vehicle Modification Panel Interim Report

   a) Transmission Controlled Spark - An Evaluation of NO_x Emissions - prepared by General Motors Corporation - April 15, 1969 - 10 pages

   b) Presentation on the Effect of Valve Overlap on Oxides of Nitrogen Emissions - prepared by General Motors Corporation - undated - 6 pages

   c) IH Spark Advance Monitoring System - prepared by International Harvester Company - March 4, 1969 - 4 pages

   d) Performance of a Catalytic Converter on Non-leaded Fuel prepared by General Motors Corporation and published in SAE - undated - 13 pages

   e) Comments on Performance of a Catalytic Converter on Non-leaded Fuel - prepared by Ford Motor Co. - presented before the SAE mid Year Meeting May 22, 1969 - 18 pages

   f) Panel Charge - prepared by J. P. Charles - dated May 27, 1969 - 1 page

   g) Engine Tune-up Data for 1970 Year Model Toyota Vehicles - prepared by Toyota Motor Company dated June 10, 1969 - 2 pages

   h) Engine Idle Setting Procedure - prepared by KAISER Jeep CORPORATION - undated - 1 page

   i) Committee Correspondence re New Jersey Vehicle Emission Inspection - dated April 7th, May 8th, June 9th, 1969 describing telephone conversation with Mr. Elston

   j) Inspection Handbook Distribution - dated June 4, 1969

   k) Quality Car Care Schedule - prepared by Toyota Motor Company - undated - 3 pages

   l) Layman's Nomenclature - undated - 2 pages

6. Fuel System Emission Panel Interim Report

   a) Laboratory Cross-Check Program - prepared by Fuel System Emission Panel - May 5, 1969 - 11 pages

   b) Fuel Tank Heating Methods - prepared by Fuel System Emission Panel - May 5, 1969 - 22 pages

   c) Emission Control Calculations on Total Motor Vehicle HC & CO Emissions - dated June 17, 1969 - 3 pages

APPENDIX B

Additional Subcommittee Reports to
The Vehicle Combustion Products Committee
(in preparation and to be completed by October 31, 1969)

1967 Annual Report of Engine & Vehicle Modification Panel

1. Status Report No. 5 of the Engine & Vehicle Modification Panel to the Vehicle Combustion Products Committee - 1967 - 27 pages

2. Tables I and II on 6 Cylinder and 8 Cylinder Camshafts

   Figure 1 - American Motors Report on 6 Cylinder Camshafts - 1 page

   Figure 2 - Field Survey of Combustion Testers

   Figure 3 - Response to Exhaust Gas with and without Air Injection using a Johnson-Williams Combustibles Analyzer

   Figure 4 - Variable Dilution System - Exhaust Gas (missing)

   Figure 5 - Blow-by Emission Measurement - prepared by New Jersey State Department of Health

   Figure 6 - 1968 Engine Information Decals

   Figure 7 - Cross Section of 199 C.I.D. Combustion Chamber - Quench and Low Quench

   Figure 8 - Cross Section of 232 C.I.D. Combustion Chamber - Quench and Low Quench

   Figure 9 - Head Gasket Bore Configuration user with Low Quench Engines 199 and 232 C.I.D.

   Figure 10 - Effect of Air-Fuel Ratio on Exhaust NO Concentrations for Various Speed-Load Combinations

   Figure 11 - Effect of Spark Timing on Exhaust NO Concentrations for Various Speed-Load Combinations

   Figure 12 - Effect of Intake Manifold Vacuum on Exhaust NO Concentrations for Various Air-Fuel Ratios

   Figure 13 - Effect of Coolant Temperature on Exhaust NO Concentrations for Duplicate Runs

3. Appendices

   A) Camshaft and Valve Timing - EVMTG Proposal

   B) Proposed AMA Engine Idle Setting Procedures - EVMPTG June 27, 1967

   C) Reply to New Jersey Regarding State Vehicle Inspection by VCP - November 10, 1967

APPENDIX B

D) Reply to Air Pollution Control Administration - December 22, 1966

E) Bibliography of Papers on Emission Control Devices Submitted to EVMP by Member Companies

1968 Annual Report of Engine & Vehicle Modification Panel

1. Status Report No. 6 of the Engine and Vehicle Modification Panel to the Vehicle Combustion Products Committee - 1968 - 23 pages

2. Appendices

   A) Control of Oxides of Nitrogen - Chrysler Study Curves, data, and Sketches illustrating Chrysler Studies in NO_x control.

   B) Exhaust System Devices for Emission Control - International Harvester Company

   C) Vehicle Inspection Procedures

   D) 1969 Emission Control Systems

   E) Mass Flow

   F) Idle Setting Procedures - A detailed description of the shop manual procedures for each manufacturer

   G) Manifold Reactors - Preliminary Test Results with Non-Flame After Burner Exhaust Manifold, F4-134 cu. in. Engine

   H) Air Injection Modifications - Toyota Motor Co., Ltd. Nippon Denso Co., Ltd.

   I) Steam-Powered Road Vehicles - Present Status

   J) Valve Timing Proposal

   K) Driveability - Driveability Demonstration

   L) Comments on California 1970 Proposals

Engine & Vehicle Modification Panel Reports

	Date of Presentation	Subject	Prepared by	Number of Pages
1.	10/17/67	Combustion Chamber Quench Changes, 1968 Models	Chrysler Corporation	1

APPENDIX B

2.	10/17/67	1968 Ford Emissions Systems	Ford Motor Company	1
3.	10/17/67	Idle Adjustments	Chrysler Corp.	1
4.	10/17/67	Idle Mixture, Effect of Miles on Idle Speed, & Timing Changes	General Motors Corporation	3
5.	10/17/67	Emission Control by Engine Design and Development	American Motors Corporation	17
6.	11/15/67	New Jersey Emissions Inspection Program	EVMP	10
7.	11/17/67	Engine Idle Setting Procedures	American Motors Chrysler Corporation Ford Motor Company General Motors Corp. International Harvester Co. KAISER Jeep CORP.	37
8.	12/5/67	Changes in Idle Speed Re. Mixture	Ford Motor Company	2
9.	12/5/67	Emission Control Labels	KAISER Jeep CORP.	1
10.	12/5/67	AMA-HEW Exhaust Flow Equations	EVMP	5
11.	1/2/68	Idle Service Instructions - CAS	Chrysler Corp.	1
12.	1/2/68	Exhaust Volume Measurements on Cycle Tests	Chrysler Corp.	1
13.	12/5/67	Survey of Emission Control Devices in Use on 1968 Models	American Motors Chrysler Corp. Ford Motor Co. General Motors Corp.	17
14.	1/68	Exhaust Emission Control Devices	KAISER Jeep CORP.	2
15.	1/4/68	Idle Mixture, Speed & Spark Timing Adj.	General Motors Corp.	6
16.	1/2/68	Exhaust System Devices for Emission Control	International Harvester Co.	1
17.	1/2/68	Exhaust Manifold Reactors	International Harvester Co.	3
18.	1/2/68	Heavy Truck Emission Control Systems	International Harvester Co.	2

APPENDIX B

19.	12/15/67	Adjusting Idle Mixture	Ford Motor Co.	7
20.	2/13/68	Changes in Idle Tune During First 1,000 Miles 1968 G. M. Cars	General Motors Corp.	1
21.	2/2/68	Decal Code	Chrysler Corp.	3
22.	2/9/68	Test Data on Catalytic System	KAISER Jeep CORP.	3
23.	2/13/68	Ceramic Exhaust Manifold Reactors	Ford Motor Co.	4
24.	2/13/68	Test Data Exhaust Emissions	KAISER Jeep CORP.	1
25.	3/12/68	Air Control Valve to Improve Running Stability After Starting on an Air Injected Gasoline Engine	Toyota Motor Co. Ltd. Nippon Denso Co. Ltd.	7
26.	3/12/68	Engines for Toyota 1968 Models	Toyota Motor Company, Ltd.	1
27.	3/12/68	Engine Stalling on Deceleration	Nissan Motor Co., Ltd.	7
28.	3/12/68	Surface to Volume Ratio 4 Cylinder Vehicle	KAISER Jeep CORP.	1
29.	4/4/68	Data on Idle Stability & Exhaust Gas Volume of Toyota Vehicles	Toyota Motor Co. Ltd.	5
30.	4/9/68	Mass Flow Data	Nissan Motor Co. Ltd.	1
31.	4/4/68	Idle Settings 4,000 Miles or Under	Chrysler Corp.	1
32.	5/8/68	Report on Present Status with Steam Powered Road Vehicles & Their Emission Characteristics	EVMP	Attach. A5 Attach. B3 Attach. C2 Attach. D1
33.	5/8/68	Preliminary Test Results with Non-Flame After Burner Exhaust Manifold F-4 - 134 cu. in. Engine	KAISER Jeep CORP.	5

APPENDIX B

34.	5/8/68	Valve Timing Proposal Submitted to EVMP	KAISER Jeep CORP. General Motors Corp. Ford Motor Co.	2
35.	6/11/68	1968 Engine Idle Setting Procedures	American Motors Corp. Chrysler Corp. Ford Motor Co. General Motors Corp. International Harvester Co. KAISER Jeep CORP. Nissan Motor Co. Toyota Motor Co.	7
36.	6/11/68	Vehicle Inspection Procedure for Emission Control Systems & Devices, Gasoline Powered Vehicles	American Motors Corp. Ford Motor Co. General Motors Corp. International Harvester Co. KAISER Jeep CORP. Toyota Motor Co., Ltd.	5
37.	7/10/68	1968 Idle Setting Procedures Shop Manual Instructions	American Motors Corp. Chrysler Corp. Ford Motor Co. General Motors Corp. International Harvester Co. KAISER Jeep CORP. Nissan Motor Co., Ltd. Toyota Motor Co., Ltd.	35
38.	8/6/68	Driveability Procedure	EVMP	8
39.	8/6/68	Valve Timing Proposal	EVMP	2
40.	8/6/68	Catalytic Converter for Emission Control	Toyota Motor Co., Ltd.	8
41.	8/5/68	Ceramic Exhaust Manifold Reactor	Ford Motor Co.	7
42.	8/6/68	Throttle Positioner	Toyota Motor Co., Ltd.	20
43.	8/21/68	Valve Timing	EVMP	2
44.	9/10/68	Report on New Engine Idle Stability	Ford Motor Co. American Motors Corp. General Motors Corp. Toyota Motor Co.,Ltd. Chrysler Corp. International Harvester Co. Nissan Motor Co., Ltd.	25

APPENDIX B

45.	8/27/68	Emission Inspection Presentation to AAMVA on Vehicle Emission Inspection	ESC Chairman	18
46.	9/10/68	Mass Flow Data	Chrysler Corp.	12
47.	8/22/68	Rating Idle Quality	International Harvester Co.	8
48.	8/16/68	Vehicle Evaluation Rating System	Ford Motor Co.	2
49.	8/9/68	Idle Quality Evaluations	American Motors Corp.	2
50.	9/7/68	Engine Idle Stability Evaluation Procedure	Nissan Motor Corp.	2
51.	9/10/68	Exhaust Manifold Reactors	International Harvester Co.	4
52.	9/68	Exhaust Manifold Reactors	Nippon Denso Co., Ltd.	3
53.	10/8/68	1969 Emission Control Systems	Toyota Motor Co., Ltd.	2
54.	10/10/68	AMA Driveability Demonstration	EVMP	12
55.	10/7/68	1969 Emission Control Systems	American Motors Corp.	1
56.	10/8/68	1969 Chrysler Cleaner Air System Compared to the 1968 System	Chrysler Corp.	3
57.	10/8/68	1969 Emission Control Systems	Ford Motor Co.	3
58.	11/1/68	Summary of 1969 G.M. Exhaust Emission Control Systems	General Motors Corp.	1
59.	11/12/68	1969 Emission Control Systems	International Harvester Co.	1
60.	1/69	Exhaust Emission Control Systems	KAISER Jeep CORP.	1
61.	12/17/68	Control Systems for 1970	American Motors Corp.	5
62.	12/17/68	Chrysler 1970 Emission Controls	Chrysler Corp.	5

63.	12/17/68	1970 Emission Control Systems	Ford Motor Co.	4
64.	12/17/68	Summary of Proposed 1970 Emission Control Systems	General Motors Corp.	7
65.	12/17/68	1970 Light Duty Vehicle Prototype Emission Control Systems	International Harvester Co.	11
66.	11/68	Projected Vehicle Emission Control System for Toyota 1970 Model Vehicles	Toyota Motor Co., Ltd.	27
67.	12/17/68	Control of Oxides of Nitrogen	Chrysler Corp.	9
68.	12/17/68	Inspection of Emission Control Systems	General Motors Corp.	3
69.	12/17/68	Supplementary Information on 1969 Emission Control Systems	International Harvester Co.	7
70.	1/7/69	Investigations of NO_x Control Systems	Ford Motor Co.	35
71.	1/7/69	Oxides of Nitrogen from Smaller Gasoline Engine	Toyota Motor Co., Ltd.	63
72.	1/7/69	Summary of Proposed 1970 Emission Control Systems	KAISER Jeep CORP.	5
73.	12/68	The Effects of the Ignition System on Exhaust Emissions	Mitsubishi Electric Corp.	26
74.	3/24/69	Engine Idle Quality Test Procedure of Toyota	Toyota Motor Co., Ltd.	6
75.	3/27/69	Reduction of Nitrogen Oxides in Automobile Exhaust	Nippon Denso Co., Ltd.	11
76.	3/11/69	Description of Ignition Advance Monitoring Systems	International Harvester Co.	5
77.	6/10/69	Engine Idle Setting Procedure	KAISER Jeep CORP.	1

APPENDIX B

78.	5/13/69	Quality Car Care Schedule	Toyota Motor Co.	3
79.	5/19/69	Performance of a Catalytic Converter on Non-leaded Fuel SAE Paper No. 690503	General Motors Corp.	10
80.	5/22/69	Comments by J. H. Jones & E. E. Weaver - Car Systems Research on SAE Paper No. 690503	Ford Motor Co.	18

Exhaust Emission Measurement Panel Reports

	Date of Presentation	Subject	Prepared by	Number of Pages
1.	9/8/67	A Proposal for an Interim Mass Exh. Emission Test Procedure	Ford	3
2.	9/8/67	A Proposal for 1970 Stds. Based on Mass Equivalents	General Motors	4
3.	9/7/67	Calculations of Exhaust Mass Emissions	General Motors	2
4.	9/8/67	Interim Mass Emission Test Procedure (9/21/67) EEMP to VCP	EEMP	8
5.	10/25/67	Proposal - Exhaust Emission Correlation Program for EEMP	Ford	4
6.	11/20/67	Curves and Tables Emissions vs. Vehicle Weight	Chrysler	17
7.	11/20/67	Interim Mass Standards for 1970	General Motors	4
8.	11/20/67	Assumptions for 1970 Certification Based on Mass	Ford	3
9.	11/20/67	Curves - F^3/Cycle vs. Engine Displacement - Inertia Weight	American Motors	3
10.	1/18/68	EEMP Notes to ESC on HEW Stds. published Jan. 4, 1968	EEMP	18

11.	1/31/68	EEMP Proposed Revision of Cal. Specs. for Assy. Line Instrument	EEMP	14
12.	3/13/68	Computer Print-Out of Best Fit Equation for Cal. Gases	General Motors	4
13.	3/13/68	Propane Response	General Motors	1
14.	3/13/68	FIA of Propane Cal. Gases Using Olson Gravimetric Stds.	EEMP	1
15.	3/13/68	Daimler-Benz Response to HEW 1970 Stds. dated Jan. 4, 1968	Mercedes-Benz	11
16.	3/29/68	Considerations in Traffic Survey and Test Cycle Development	TSP	3
17.	4/17/68	Effect of Emission Control System on Reactivity	Ford	3
18.	4/17/68	Relative Efficiencies of Control Systems - Table	Chrysler	1
19.	5/9/68	Report on Variable Dilution Sampling - Clark	General Motors	8
20.	5/9/68	Report on NO_x Measurement - Lang	General Motors	13
21.	5/9/68	Production Line Test - Instrument and Test Procedure	American Motors & Calif. ARB Staff	1
22.	5/28/68	Table - Spread Between NDIR and FID Analyses	American Motors	2
23.	5/28/68	Comparison Between 7-mode and 10-mode cycle NDIR vs. FID	International Harvester	5
24.	5/28/68	Whittaker Method of Measuring NO - Strip Chart	Chrysler	2
25.	5/28/68	Proposed answer to Cal. Bay Toll Crossings Division	EEMP	7

APPENDIX B

26.	6/5/68	Strip Chart of NO Measurement Using Whittaker Method - Letter from Whittaker to W. Fagley, Jr.	Chrysler	4
27.	7/23/68	European Consideration of Atmospheric Pollution Problems	AMA	3
28.	7/17/68	Comparison of Emission Reactivities - Table I	General Motors	1
29.	7/17/68	Number of Hydrocarbons Evaluated Under Controlled Conditions	General Motors	1
30.	7/17/68	Graphs plus Computer Summaries - HC Reactivity vs. Conc. by C. G.	General Motors	15
31.	7/17/68	Comparison - HC Conc. by C. G. vs. FID	General Motors	3
32.	7/17/68	Correlation - Reactivity and Gas Chromotography	Ford	1
33.	7/17/68	SAE Paper 680419 - FID Technique - HC in Diesel Exhaust	International Harvester	15
34.	7/17/68	Correlation Between 7-mode and USPHS 10-mode cycles - Clark	General Motors	9
35.	7/17/68	Schematic Diagram - NO and O_2 Inst. Console	General Motors	1
36.	7/17/68	Relative Sensitivity - FID Analyzer	Chrysler	2
37.	7/30/68	Measurement Procedure - NO for Cal. 1970	EEMP	16
38.	7/30/68	Background Data for Calculating NO_x for California	Chrysler	3
39.	7/30/68	Correlation Program - HEW-AMA Labs. - Westveer	EEMP	4
40.	7/30/68	Report on Reactivity to ESC from Joint ACP and EEMP	EEMP	6
41.	8/5/68	Report on Measurement Procedure for NO California - 1970	EEMP	15

APPENDIX B

42.	9/11/68	Continuous Trace - Rate of Exh. Flow, 10-mode cycle	Chrysler	3
43.	9/11/68	Mass Flow Data - Fagley (7- vs. 10-mode cycles)	Chrysler	14
44.	9/11/68	Letter - Jensen to Maga - Mass Emission Measurement Technique	AMA	3
45.	9/11/68	Table - Fuel Measured Mass Compared w/Calculated Fed. Std. Mass	Chrysler	1
46.	9/11/68	Repeatability of NO Measurement Technique - 9 Vehicles	General Motors	6
47.	12/3/68	Comments to ESC on Cal. Law AB 357 - Assembly Line Test	EEMP	11
48.	1/27/69	Report on NO_x Humidity Factor - Maeda	Nissan	16
49.	1/27/69	EEMP to ESC Report on Cal. ARB Assembly Line Test	EEMP	6
50.	2/5/69	European Driving Cycle - Report by F. Louis	Renault	4
51.	2/18/69	Exhaust Flow Method of Mass Measurement - Fagley	Chrysler	19
52.	2/18/69	Mass Emission Program - Mick	General Motors	33
53.	3/4/69	Comments on Calif. Proposed Assembly Line Test Procedures	Toyota	5
54.	3/18/69	Effect of Moisture on NO_x Emissions	Ethyl	24
55.	3/20/69	Effect of Fuel Composition -- on FID/NDIR Ratio - Campau	Ford	11
56.	3/26/69	Reduction of NO_x - Manifold Reactor - Tanaka _et al_	Nippon Denso	12
57.	4/11/69	Exhaust Emission Measurement Correlation Program - Westveer	EEMP	4

APPENDIX B

58.	4/14/69	Supplement - Moisture on NO$_x$ - RK Factor Calculation	Ethyl	2
59.	4/21/69	Comments on Foreign Cycles - Lombardi	EEMP	3
60.	4/30/69	HC Measurement by FID - Improved Response - Teague	ACP/EEMP	3
61.	5/29/69	Diagrams of Sampling and Analytical Systems - Proposed	EEMP	4
62.	6/5/69	Effective and Economic Control of Auto Emissions - Sarto	EVMP	7
63.	7/1/69	Preliminary Evaluation of NO$_x$ Analyzer - Jackson	General Motors	3
64.	7/1/69	Determination of CO$_2$ at Wahnsdorf, Germany - Published	Mercedes-Benz	2
65.	7/1/69	Comparison of 3 dynamometers in Germany	Mercedes-Benz	2
66.	7/1/69	Dynamometer Effects on Emissions Using CVS	Nissan	2
67.	7/23/69	Foreign Cycle Evaluation - Lombardi	EEMP	4

Heavy Vehicle Panel Reports

	Date of Presentation	Subject	Prepared by	Number of Pages
1.	3/7/69	Evaluative Control Procedures for Heavy Trucks	HVP	4
2.	3/26/69	Reduction of Nitrogen Oxides in Automobile Exhaust	Nippon Denso	11
3.	5/22/69	Outline for Research Program for Heavy Vehicle Emission Data	HVP	2

APPENDIX B

Ad Hoc Traffic Survey Panel Reports

	Date of Presentation	Subject	Prepared by	Number of Pages
1.	5/24/67	Comparison of Chrysler 50,000 mile and AMA Durability Schedules	Chrysler Corp.	4
2.	5/24/67	Comparison of Durability Schedules	General Motors Corp.	1
3.	3/27/68	Consideration in Traffic Survey and Test Cycle Development	General Motors Corp., Chrysler Corp., Ford Motor Company	3
4.	9/30/68	Background of Vehicle Exhaust Gas Text Procedures in Japan	Toyota Motor Co. Ltd.	4
5.	2/5/69	European Driving Cycle	Renault	4

Atmospheric Chemistry Panel Reports

	Date of Presentation	Subject	Prepared by	Number of Pages
1.	3/4/69	Nitrogen Oxides in the atmosphere	ACP	34
2.	7/8/69	HEW meeting - Cincinnati reactivity criteria	ACP	6

Vehicle Emission Surveillance Panel Reports

	Date of Presentation	Subject	Prepared by	Number of Pages
1.	10/11/67	1967 Surveillance Program on High Mileage Exhaust Emission Equipped Vehicles	Ford Motor Co.	23
2.	3/27/69	Hot vs. Cold Start Surveillance Testing	VESP	9
3.	6/9/69	Surveillance Data Summary Report to ESC	VESP	5

APPENDIX B

Fuel Systems Emission Panel Reports

	Date of Presentation	Subject	Prepared by	Number of Pages
1.	10/18/67	Letter from AMA to NAPCA outlining available data on Evap Control Systems	AMA-VCP General Motors	10
2.	10/25/67	Charcoal Canister Evaporative Emissions Control System	General Motors	9
3.	10/25/67	Crankcase Storage of Evaporative Emissions	General Motors	10
4.	12/1/67	Carbon Air Cleaner Evaporative Control	Ford	10
5.	12/1/67	Crankcase Storage System - Evaporative Control	Ford	15
6.	12/1/67	History of Evaporative Control Studies	Ford	13
7.	1/68	Chrysler Closed Vent System	Chrysler	8
8.	1/68	AMC Evaporative Systems	American Motors	6
9.	4/24/68	Results of Lab Cross Program	FSEP	5 charts
10.	6/14/68	Evaporative Loss Data	FSEP	7 charts
11.	7/68	Absorption of HC Vapor by Charcoal	Toyota	15
12.	8/23/68	Proposed Test Procedure for Determination of Liquid Fuel Losses from Vehicle Fuel Tank	FSEP	9
13.	9/27/68	Same		8
14.	10/15/68	Joint (FSEP & HVP) Report to ESC on Test Procedure for Heavy Truck Losses	FSEP	4
15.	3/18/69	Prelim. Progress Report of Shed Test Procedure	FSEP	3
16.	3/24/69	Fuel Temp vs. Vapor Temperature	KAISER Jeep	2

APPENDIX B

17.	3/24/69	Comparison of Evap Test Procedures	Ford	9
18.	3/24/69	GM Test on Effect of Heating Test on Evap Emission	General Motors	2
19.	3/25/69	Deterioration Factor of Evap Emission Data	Toyota	7
20.	4/8/69	Comparative Shed Tests	General Motors	2 charts
21.	4/18/69	Report of Evap Testing	Ford, General Motors, Chrysler, American Motors	7
22.	4/23/69	Effect of Heating Method of Fuel Tank on Evap Emission	Nissan	4
23.	4/23/69	Heating Pad Installation vs. Fuel Tank Emissions	KAISER Jeep	3
24.	4/28/69	Review of Shed Testing Data	Ford, American Motors, Chrysler	6
25.	5/5/69	Fuel Tank Heating Methods	FSEP	23
26.	5/6/69	Laboratory Cross Check Program	FSEP	11
27.	5/18/69	Shed Test on Control Equipped Cars	General Motors	2
28.	7/1/69	Comparison of Evap Test Sequences	FSEP	6
29.	7/18/69	Proposals for Engineering Acceptance of Evap Control Systems	FSEP	3

APPENDIX B

Senator **Gorton**. We will now hear from the panel consisting of Mr. Dennis, Mr. Friedlander, and Mr. North.

Mr. Friedlander.

Mr. **Friedlander**. Yes, sir.

Senator **Gorton**. I understand you have a plane to catch imminently.

Mr. **Friedlander**. Yes, sir, that is true.

Senator **Gorton**. We will be happy to hear from you first under those circumstances, if it is all right with the other two.

Mr. **Friedlander**. I appreciate that very much. I can leave them to answer the questions, then.

STATEMENT OF PHILIP P. FRIEDLANDER, JR., VICE CHAIRMAN, SMALL BUSINESS LEGISLATIVE COUNCIL

Mr. **Friedlander**. Mr. Chairman, this statement is submitted on behalf of the Small Business Legislative Council, a coalition of 75 national business and trade associations. Our membership list has been attached to the statement which we filed. In turn, our members represent about 4.5 million small business units covering just about the full range of SIC classification.

I am Philip P. Friedlander, Jr. I am serving as vice chairman of the council and I am the executive vice president of the National Tire Dealers and Retreaders Association, which itself is a national association representing some 5,000 independent tire dealers with 13,000 outlets across this country.

As I indicated, we have submitted for the record, Senator, a more detailed statement.

Senator **Gorton**. It will be included in the record in its entirety.

Mr. **Friedlander**. Thank you, sir.

We are pleased to have this opportunity to appear here today on a timely topic, the Federal antitrust policy as it is currently emerging and its impact as we see it on small business. Competition is the heart of a national economic policy. For small business, however, competition is not just an ideal; it is a necessity always to be encouraged, for without competition small businesses ultimately will find themselves dependent upon the sufferance of the dominant enterprises surrounding them.

We therefore want to make it plain to this committee that the small business community supports strong and vigorous enforcement of the rules of competition because we believe that the small business community as we now know it cannot exist without it. Indeed, competition itself cannot exist and certainly cannot flourish without a strong small business sector. We encourage legislative initiatives that foster this policy.

Today, we believe that a tradition of antitrust policy stretching back 90 years may be seriously in danger. Assistant Attorney General Baxter and Federal Trade Commission Chairman Miller—and I have listened carefully to them this morning—apparently adhere to a narrower view of the purposes of the antitrust laws and the proper scope of antitrust enforcement policy than any Government antitrust leaders in memory.

In sum, their view appears to be that the only function of the antitrust laws is to promote economic efficiency. From where we stand, both officials are disdainful of the notion that the antitrust laws are also designed to preserve competitive opportunities for small business and to prevent dangerous aggregations of economic and market power.

They have taken a strikingly permissive stance, it seems to us, toward mergers. While fond of remarking that bigness is not necessarily badness, they in fact appear to believe that as a general rule bigger is better on efficiency grounds. Skeptical of concern that market power may be abused, both of these Government leaders seem to regard increasing concentration and demise of smaller competitors as the inevitable and unmourned consequence of free and open competition.

The only area of enforcement activity both officials appear to support without qualification is the prosecution of horizontal price-fixing conspiracies. In contrast, both officials signal what seems to us to be a virtual end to cases involving vertical price-fixing, and apparently believe it desirable to permit manufacturers to exert control over their distributors and dealers.

Both officials, while giving some lipservice to the Robinson-Patman Act, repeatedly have criticized it, specifically assert that it does not help small business, and are plainly disinterested in enforcing it. I did not find anything here this morning that changed our view in that regard.

Their message may be ominous, and the atmosphere which they are creating is clear, at least it seems so to us. It is now open season on the antitrust laws. Large companies may now feel free to engage in what might be illicit antitrust conduct, for this administration may well turn its back on all but the most blatant violations.

I have personally been looking at antitrust enforcement since the Eisenhower years, and I have never heard such comments as I have heard during the early days of the Reagan administration. There appears to be a determined effort to reverse and effectively gut 90 years of antitrust enforcement tradition. This could constitute a grave and imminent threat to small business throughout the country.

The individual small businessman, if he cannot get relief through the enforcement agencies, can now look forward to solving many of his problems via court cases in which his starting costs can be $50,000, $100,000, $150,000 or more. The length of time in which to adjudicate an antitrust case can be so long that those in small business have learned that by the time the case is decided, the relief is too late. The history of small business can document this time and again. In our own industry I am well aware of it.

This legal situation can only be relieved if the Assistant Attorney General of the United States and/or the Federal Trade Commission enforce the statutes which they are sworn to uphold. The administration's continuing encouragement of mergers and its public acknowledgment of reduction in enforcement by the Federal Trade Commission is a green light, it seems to us, to predatory practices that we have not seen the like of since Teddy Roosevelt busted the trusts in 1911.

If we in the small business community are upset about anything, it is the attitude which we find totally unacceptable in terms of the enforcement of the law and signals the larger companies are receiving. It might help if these senior officials would stop talking so much about not enforcing the law.

In 1936, Congress overwhelmingly approved the Robinson-Patman Act, which has come to be known as the Magna Carta of small business. Essentially, the Robinson-Patman Act is intended to insure that small businesses can buy on the same terms and conditions as can large businesses. To assist the small businesses, Robinson-Patman was enacted to stop in their incipiency anticompetitive practices which have plagued this country. It forbids price discrimination between purchasers of goods of like quality in interstate commerce, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

We are aware of the critics' charge that Robinson-Patman results in higher prices to the consumer. We are not aware of any factual data to support the charge nor do we think it will withstand careful scrutiny. Essentially, the act requires that the same prices be made available to all, with adjustments based on cost, justified volume, and other legitimate factors.

If a manufacturer, for example, sells at his lowest reasonable price to all, then all customers will benefit through the ensuing price competition of healthy, vigorous dealers. Independent dealers know how to compete and they do so successfully.

It is not surprising, then, that small business has consistently opposed de facto repeal of the Robinson-Patman Act in the past. It has done so not because the act is protective but because it provides the basis for small business to withstand unfair competitive practices, yet the administration's antitrust authorities describe the law—and you heard part of the quote earlier today—as full of "absurdities" or as "unjustified protection for small business from the rigors of competition." Their public statements announce an actual administrative repeal of the statute. Such a development must be considered to be intolerable to small business.

The antitrust laws are designed to insure that the public has a plurality of choices. When the choices are diminished by excessive concentration of power, the public suffers—and I seem to differ here with the Assistant Attorney General's recent comments.

In recent times it has been seriously suggested by members of this administration that the Bureau of Competition of the Federal Trade Commission be eliminated on budgetary and policy grounds. It is claimed that there is no need for the Bureau of Competition, that it duplicates the antitrust enforcement mission of the Department of Justice and creates more regulation by Government.

The Small Business Legislative Council opposes any attempt to eliminate the system in existence now, for the Trade Commission, through its Bureau of Competition, occupies a unique and central role in antitrust enforcement. If small business does not get the enforcement here, we do not know where we can send them to get enforcement. What do we tell our people about where to go and get the laws enforced if the Federal Trade Commission does not enforce them? I have no answer for that question, which has been posed to us recently.

The Federal Trade Commission was organized in 1914 to supplement and further our national policy of encouraging competition. This policy is the antithesis of regulation by Government and is the primary and vital mission of the Federal Trade Commission. The Federal Trade Commission was created to be an antitrust expert and to apply that expertise to the implementation of the laws that embody the virtues of our free enterprise, competitive system.

As a general matter, then, the Federal Trade Commission does not and cannot duplicate the antitrust function performed by the Department of Justice. Moreover, the FTC proceeds in two special ways: First, it reaches those acts and practices that tend to be destructive of competition and tend toward monopoly, whether engaged in by one firm or by several.

The Department of Justice cannot do this; they must prove the existence of a conspiracy, or alternatively something close to actual monopoly. It is the FTC and only the FTC, through the investigative and prosecutorial mission of its Bureau of Competition, that can control most individual conduct that is undesirable as being anticompetitive.

The second area of FTC enforcement is that the FTC and only the FTC can intercept anticompetitive conduct in its incipiency under its authority to curb unfair methods of competition. That is, the FTC can and does challenge market behavior that has not yet reached the stage of being full-blown restraint of trade.

Another area—and I still do not understand it after listening to the chairman this morning—is the idea that the FTC may no longer require substantiation of advertising. Frankly, Senator, I think that is a bunch of nonsense, what he was talking about this morning. We were involved 25 years ago with setting the FTC tire advertising guides, and they did have a tendency to clean up the marketplace.

If we do not have something like the FTC to do something about advertising, it will not be done because in my opinion the States are not geared up to take on that responsibility nor have enough knowledge in most of the States to do so. I am sure we are going to be hearing that as the rationale, that the States can handle this kind of problem.

The closing of 4 of the 10 offices of the Federal Trade Commission is disturbing, as is the attitude on advertising. These are signals which greatly concern us.

Mr. Chairman, I am sure I have expressed it clearly enough, that we are concerned about the direction in which the Nation is moving on preserving competition. We, you and I, should not sit by and let the Nation's biggest employer, small business, suffer and possibly fall.

Thank you.

Senator GORTON. I am going to let you go. We may submit some questions to you in writing but I would like to ask you one question here orally.

Mr. FRIEDLANDER. All right, sir.

Senator GORTON. Do you feel that Congress should seriously examine further statutes on the subject of mergers, either creating presumptions against, or absolute prohibitions of, mergers of companies in which one of the merged companies is more than a certain size?

Mr. FRIEDLANDER. Yes. I think you should examine that, but I would suggest to you that you should examine some other aspects of the antitrust laws. I know of some in which there is no potential illegality but which are creating serious problems for multiple small businesses. This is in the area of direct selling and dual distribution, for example. A reexamination by this committee of not only the merger question but of the other would be very helpful, I think.

Senator GORTON. Thank you very much.

Mr. Dennis and Mr. North, we will hear from each of you in that order and then save any questions, if we have time, until both of you have completed your testimony.

Mr. Dennis?

STATEMENT OF WILLIAM J. DENNIS, JR., DIRECTOR OF RESEARCH, NATIONAL FEDERATION OF INDEPENDENT BUSINESS

Mr. DENNIS. Thank you, Mr. Chairman. I would like to submit my statement for the record and summarize it, if I might.

Senator GORTON. You certainly may, and your entire statement will be included in the record.

Mr. DENNIS. Thank you.

I would like to open with five basic observations which we think are relevant and particularly applicable to this hearing. First of all, there is more to an anticoncentration policy than the enforcement of antitrust statutes per se. Immediately two areas come to mind: regulatory policy and tax policy.

For example, a member of my staff has conclusively demonstrated that the regulated trucking industry is one of the most concentrated of all industries in the country. Fortunately, last year Congress in its wisdom passed the trucking deregulation bill. Unfortunately, administration appointees have served to block progress in implementing that bill. The point is, however, that there is more to an anticoncentration policy than strictly antitrust.

Two, antitrust cases are enormously complex and often quite lengthy. Their cost and length as a practical matter make it an impossibility for a small business or a group of small businesses to engage in private litigation.

Three, relatively few antitrust cases are prosecuted. The clear implication is that either very few anticompetitive activities exist or that the law is so narrowly drawn that a successful prosecution is almost impossible.

Four, the argument in favor of mergers and acquisitions is that they are actions resulting in greater economic efficiencies, thereby providing greater good for the consumer. A corollary is that even if they do not provide economic efficiencies in the near term, Government interference in these matters really infringes on the rights of the individual firm and really should not affect what eventually may prove to be an ill-founded decision.

However, in fact the empirical evidence on the first count is mixed at best. It is not conclusive in either direction. Some mergers and acquisitions prove greater efficiency; some do not. If we have mixed results from this, then, of course, what about the corollary in favor of mergers and acquisitions?

That argument assumes that there are no inherently negative consequences of a merger or an acquisition involving a larger firm. I think we challenge that assumption. That is really a critical assumption that is made and I think it is one that merits considerable thought and considerable investigation.

Five, we think it reasonable that the burden of proof in acquisition and merger cases involving the Nation's very largest firms should be shifted. Unless the good of an acquisition or merger can be demonstrated, the increased economic power accruing should offer sufficient grounds to deny the proposed action.

Commenting on the administration's antitrust policy is really quite difficult when we are not totally clear what the policy is. While it appears that the policy is laissez faire, we do not have the resources to judge the merits of each of the cases involved, and we do note that, for example, the Heilemann purchase of the Schlitz Brewing Co. has been challenged. However, whatever the policy is, it leaves the clear implication that it is no policy, and that does give us cause for enormous concern.

NFIB believes that the law needs to be changed. Given the record of administrations seemingly more inclined to pursue antitrust matters, it is questionable how successful an administration could be, no matter how committed. However, if the administration is publicly committed, then there is at least some salutary effect flowing through deterrence.

In other areas affecting competition the picture is more mixed. Certainly in the regulatory area, Vice President Bush's regulatory reform group has attempted at every turn to try to gather small business input and to try to determine what rules and regulations are particularly offering a disproportionate impact. On the other hand, we noted the trucking deregulation question which has hardly been favorable to smaller firms.

On tax policy, we believe that the administration offered the better of the two tax packages recently considered.

With notable exceptions, the administration has yet to clearly demonstrate that it recognizes any distinction between large and small firms. To the extent that view has allowed the administration to focus on redirecting the economy toward sustained noninflationary growth, no problem has been created. The principal problems of small business in the near term are similar to those of larger firms; inflation, interest rates, sluggish sales, and uncertainty. However, to the extent that it shapes the long-term competitive balance, including the rules of the marketplace, it is unquestionably disturbing.

Thank you.

Senator GORTON. Thank you, Mr. Dennis.

Mr. North.

STATEMENT OF WILLIAM D. NORTH, GENERAL COUNSEL, NATIONAL ASSOCIATION OF REALTORS

Mr. NORTH. Thank you, Senator.

First of all, may I submit my statement for the record, please?

Senator Gorton. You may, and it will be included in full.

Mr. North. In the interest of time, I would just like to make a few summary comments.

In your opening statement, you requested us to comment on this basic question: Do you recognize the congressional intent to preserve local control of business and to protect small business as a relevant consideration in setting your antitrust enforcement policies?

I would like to respond to that by saying that we do emphatically recognize that as an extremely relevant, critical intent. The fact of the matter is that the antitrust laws had their origin not out of a search for improved efficiency but rather out of an effort to avoid the cartelization of the American economy. In fact, I believe it was Holmes who said that efficiency is the price of competition.

We see, and I think the record of American performance in the economy proves, that small business is the origin of innovation and opportunity and creativity which has made the American standard of living paramount among all nations. Xerox started small; IBM started small; Polaroid started small; Apple computers started small. All of the leading organizations have had their origin in the dream or visualization of opportunity of one or a very few individuals.

I think that the small business people—and I would include the Realtors of America among those; our average firm has approximately six employees or sales associates—are not looking for an advantageous situation. We are not looking for an undue advantage. We are looking for a level playing field in the business community, and this means that we must have an environment conducive to risk taking.

I have about 50,000 real estate broker members of the national association that would just love to stay in business by selling this year's tax losses, like Ford did the other day. The fact of the matter is that in a capitalist economy—and I think this country is committed to the concept of a capitalist economy—capital is the sine qua non of survival. We are concerned that access to capital is being made unavailable to small business as a result of the activity which is going on in the merger of financial institutions.

We note in a recent report which is cited in our statement that some 900 proposed mergers were reviewed in the last year between banks and bank holding companies and financial institutions, 900. That is more than all of the other mergers which were reported by, I believe it was, Dr. Miller of the FTC.

Reference was made to the $46 billion which is committed to lines of credit to finance these mergers. Forty-six billion dollars may not mean a great deal in terms of $528 billion of commercial credit, but $46 billion represents 62 percent of the total mortgage money required by this country to finance 2 million homes, 62 percent. There is one quality of lines of credit, and that is that the banks who issue those lines of credit are effectively foreclosed from making long term commitments, mortgage commitments, of that money.

We also note that the end result of the concentration of financing institutions is to respond to economies of scale. Historically we all know that there is a preference on the part of banks for larger transactions and for the servicing of their prime customers. If most of our real estate brokers and most of their customers could obtain the prime rate, they would be pretty happy, but there is about a 3 or 4 percent differential between the prime rate right now—the rate at which the large corporate customers obtain their money, the Exxons, the Mobils, the Texacos, et cetera—and the rate at which our people, our customers, must borrow in order to have a place to live.

We are also concerned—and this is very important from our standpoint—about conglomeration and the potential that conglomerate mergers provide for cross-subsidization. If there is one thing that has been stressed in this economy and in this free enterprise system that we talk about, it is the importance of freedom of consumer choice.

However, we suggest that if in order to obtain financing, this all important access to money, you have to purchase your real estate through the financing institution's brokerage office, your insurance through the financing institution's insurance agents, your stocks and pension plan through the financing agency's stock brokerage house, your home purchase agreement through the financing agency's third-party arrangement, or even your furnishings and appliances through the financing agency's department stores, we have a very serious limitation on freedom of choice.

Now this brings us to one basic concern: What do we recommend? Well, we recommend very strongly that this Congress should consider, if necessary through new legislation, a law which will provide that the availability of credit cannot be packaged with the purchases of other services. We suggest further that this Congress, through this committee if you will, should seriously consider limiting vigorously the concentrations of financing.

About 100 years ago—I would recall this to the committee because there seems to be a cyclical pattern in our economy and in our society—about 100 years ago this country was very seriously split. The split gave rise to William Jennings Bryan's famous "cross of gold" speech. Essentially it was a split between the debtors and the creditors, the people who had the money and the people who needed the money to survive.

We have a different economy but we are rapidly trending to precisely the same split which existed 100 years ago, and we would urge this Congress to not crucify small business, the debtors of this country, on the cross of credit gold.

I thank you very much.

Senator Gorton. Thank you both. As a matter of fact, each of you has answered the question which I asked of Mr. Friedlander, and I just simply would like to make certain that I have your recommendations correctly.

Mr. Dennis, you said that there should be consideration of amending the antitrust laws in the field of mergers to create a presumption against, as opposed to a presumption in favor of, certain mergers when they involve relatively large companies. Is that not correct?

Mr. Dennis. That is correct. As a technical matter, it is I suppose easier to talk about the theory than it is to develop something very specific in practice, but that is exactly correct, sir.

Senator **Gorton**. Mr. North, you made it very explicit, first, that we should prohibit the packaging of credit with any other forms of goods or services——

Mr. **North**. Yes, Senator.

Senator **Gorton** [continuing]. And, second, that we should look very carefully, at laws permitting the consolidation of financial institutions, certainly not liberalize them, and perhaps restrict them to a much lower level than has been evident in the course of the last couple of years.

Mr. **North**. It would be an ultimate tragedy for small business if, in order to obtain the credit they require to survive, they have to make a pilgrimage to Wall Street or LaSalle Street.

Senator **Gorton**. Would each of you comment on the proposal before the Federal Trade Commission to close some or all of its regional offices?

Mr. **Dennis**. I am really not sure that I have anything to say, per se, on that, Senator. We have not really gone through to see and to determine how well the administration's argument on that particular point bears the facts.

The question is, essentially, I think, should the Bureau of Competition, in particular, be an efficient and effective mechanism? The answer is yes, I think so. However, then we take it one step further and then it becomes, what is the most efficient means from a management standpoint and things of that nature? I cannot answer that question for you.

Senator **Gorton**. Do you have any thoughts on that subject, Mr. North?

Mr. **North**. Simply that it seems to me that logically form should follow substance, and the arrangement for the FTC—that is, the organizational arrangement of the FTC—should be that which is most efficient to accomplish the objectives of the FTC. It seems to me that, basically, the issue is, what is the focus of the FTC going to be? Again, until that decision is made and articulated rather clearly, I do not see how you can make an evaluation whether an office here or an office there is the best form to achieve the substance.

Senator **Gorton**. Thank you.

Mr. Dennis, I think this question is really primarily for you, though Mr. North may certainly comment if he wishes. Mr. Baxter, in his written statement, stated that resale price maintenance can be beneficial to small business and questioned some preexisting policies in that area. Would you like to comment on that point?

Mr. **Dennis**. Well, to be honest with you, I am not quite sure what he meant by resale price maintenance, if I can be so blunt.

Senator **Gorton**. Then why don't we defer that question and ask you and the staff of NFIB to look at that written statement and to respond to us in writing on it when you have had a better chance to consider it?

Mr. **Dennis**. We would be happy to.

Senator **Gorton**. Both of the witnesses from the administration suggested that a less restrictive antimerger policy would be beneficial in several ways to small businesses, I think primarily from the point of view of allowing small businesses to sell out when they wish to do so. I already have a pretty good idea of what your views are on that subject, but if you would like to amplify them in any respect, please do so.

Mr. **Dennis**. I think they were talking about the classic distinction between competition and competitors. Obviously there are times when some of our people will benefit by being able to sell out. I mean, that seems to me to be just very, very obvious.

On the other hand, if you look at the aggregate numbers, you are going to find a situation where it is very infrequent, very, very infrequent, where a smaller business will sell out to a very large business. Therefore, the idea that we should maintain a very loose, open-ended, laissez faire policy at the top because there are a few small businesses that may take advantage of that particular situation, I think things do not wash in the balance.

However, I do think that that is one of the reasons why, rather than talk about absolute prohibitions on mergers of very large sizes, we should really be talking about shifting the evidence burden. In that way, we can take advantage of any real efficiencies or benefits that may accrue in limited instances while also cutting down on some of the things that certainly are not quite so beneficial.

Senator **Gorton**. If you have no further comments——

Mr. **North**. I have no further comments.

Senator **Gorton** [continuing]. I should like to thank both of you for your patience this morning, among other things, and for the extremely valuable statements you have made in pursuing these vitally important questions.

Mr. **North**. On behalf of the realtors, we thank you very much.

[The prepared statements of Mr. Freidlander, Mr. Dennis, and Mr. North follow:]

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STATEMENT OF

PHILIP P. FRIEDLANDER, JR.

ON BEHALF OF

THE SMALL BUSINESS LEGISLATIVE COUNCIL

BEFORE THE

SENATE COMMITTEE ON SMALL BUSINESS

SUBCOMMITTEE ON PRODUCTIVITY AND COMPETITION

HOLDING HEARINGS ON

FEDERAL ANTITRUST POLICY AND

SMALL BUSINESS

DECEMBER 1, 1981

> "It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small business concerns in order to preserve free competitive enterprise. . . ."
>
> (P.L. 85-536, as amended, Section 2(a), Small Business Act.)

*Of the National Small Business Association

Mr. Chairman and members of the Subcommittee:

This statement is submitted on behalf of the Small Business Legislative Council (SBLC), a coalition of 75 national businesss and trade associations. Our membership list is attached. In turn, our members represent about 4½ million small business units covering just about the full range of SIC classifications.

My name is Philip P. Freidlander, Jr. I am the Vice Chairman of the SBLC and Executive Vice President of the National Tire Dealers and Retredders Association, which itself is a national association representing 5,000 members with 13,000 outlets. I am accompanied here today by Thomas A. Mauro, antitrust counsel to the SBLC and a member of its Anti-trust Committee.

The SBLC is pleased to have this opportunity to testify on a most important and timely topic -- the federal antitrust policy as it is currently emerging and its impact on small business. Competition is the heart of national economic policy. For small business, however, competition is not just an ideal; it is a necessity always to be encouraged and exploited. For without competition, small businesses ultimately will find themselves dependent upon the sufferance of the dominant enterprises surrounding them.

We therefore want to make it plain to this Committee that the small business community supports strong and vigorous enforcement of the rules of competition because we believe that the small business community, as we now know it, cannot exist without it. Indeed, competition itself cannot exist, and certainly cannot flourish, without a strong small business sector. We encourage any legislative initiative that fosters this policy.

Today, we believe that a tradition of antitrust policy stretching back 90 years is seriously in danger. Assistant Attorney General Baxter and Federal Trade Commission Chairman Miller adhere to a narrower view of the purposes of the antitrust laws and the proper scope of antitrust enforcement policy than any government antitrust leaders in memory. In sum, their view appears to be that the only function of the antitrust laws is to promote "economic efficiency." Both officials are disdainful of the notion that the antitrust laws are also designed to preserve competitive opportunities for small business and to prevent socially dangerous aggregations of economic and market power. They have taken a strikingly permissive stance towards mergers of all kinds; while fond of remarking that "biggness is not necessarily badness," they in fact appear to believe that as a general rule "bigger is better" on "efficiency" grounds.

Skeptical of concerns that market power may be abused, Baxter and Miller generally regard increasing concentration and the demise of smaller competitors as the inevitable (and unmourned) consequence of free and open competition. The only area of enforcement activity both officials support without qualification is prosecution of horizontal price-fixing conspiracies; in contrast, both officials signal a virtual end to cases involving vertical price fixing -- unless they result in (unspecified) horizontal effects -- and believe it desirable to permit manufacturers to exert pervasive control over their distributors and dealers. Both officials, while giving lip service to the Robinson-Patman Act repeatedly criticize it, specifically assert that it has not helped small business, and are plainly disinterested in enforcing it.

Their message is ominous and the atmosphere they have created clear; it is now open season on the antitrust laws. Companies are free to engage in illicit antitrust conduct, for this administration will turn its back on all but the most blatant violation. Their determined efforts to reverse and effectively gut 90 years of antitrust enforcement tradition constitutes a grave and imminent threat to small business throughout the country.

Antitrust Poilicy

The antitrust laws were this nation's response to the laissez-faire capitalism that developed after the Civil War. The great trusts that followed created a feeling of deep unease among the people. Supreme Court Justice John M. Harlan characterized the mood as follows: "There was everywhere a deep feeling of unrest. . . . The conviction was universal that the country was in real danger from (the aggregations of) capital in the hands of few individuals and coorperations controlling, for their own profit and advantage exclusively, the entire business of the country."1/

These feelings and fears resulted in the Sherman Act of 1890. There can be no doubt that this Act and the Clayton Act of 1914 were rooted primarily in the belief that excess corporate power must be restrained to assure competition, prevent exploitation of the consumer, and protect democratic institutions by preventing excessive centralization of economic power.2/ In the Brown Shoe case the Supreme Court reminded us that "we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally-owned businesses. Congress appreciated that occassional higher costs and prices might result from the maintenance of fragmented industries and markets."3/

The history of these laws --their interpretation by the Courts and implementation through legislative and executive actions -- also leaves no doubt as to their function. As Senator Kefauver said in discussing the amendments to Section 7 of the Clayton Act in 1950: "I think we must decide very quickly what sort of country we want to live in. . . . The present trend of great corporations to increase their economic power is the antithesis of meritorious competitive development. . . . When [the people] lose the power to direct their own economic welfare they also lose the means to direct their political future."

In sum, Mr. Chairman, there must be vigorous and specific enforcement of the antitrust laws as Congress has intended and the Courts have directed so that a vital and fundamental national policy is perpetuated. Congress has never changed this policy and, we submit, the Executive Branch of our government is bound to uphold it.

The Robinson-Patman Act

In 1936, Congress overwhelmingly approved the Robinson-Patman Act, which has come to be known as the "Magna Carta" of small business. Essentially, the Robinson-Patman Act is intended to insure that small businesses can buy on the same terms and conditions as can large businesses. To assist the small business, Robinson-Patman was enacted to stop in their incipiency anti-competitive practices which have plagued this country. It forbids price discrimination between purchasers of goods of like quality in interstate commerce, where the effect of such discrimination "may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

We are aware of the critics' charge that Robinson-Patman results in higher prices to the consumer. We are not aware of any factual data to support the charge, nor do we think it will withstand careful scrutiny. Essentially, the Act requires that the same prices be made available to all with adjustments based on cost-justified volume and other legitimate factors. If a manufacturer, for example, sells at his lowest reasonable price to all, then all customers will benefit through the ensuing price competition of healthy, vigorous dealers. Independent dealers know how to compete and they do so successfully.

It is not surprising, then, that small business has consistently opposed de facto administrative repeal of Robinson-Patman in the past. It has done so not because the Act is protective, but because it provides the strength small business needs to protect itself. Its mere presence is a cornerstone behind which small business stands. But the Administration's antitrust authorities describe the law as full of "absurdities"4/ or as an "unjustified protection for small business from the rigors of competition."5/ Their public statements announce an actual administrative repeal of the statute. Such a development is intolerable to small business. We urge the Subcommittee to take whatever action necessary to put an end to this policy.

Mergers

The essence of Section 7 of the Clayton Act is to stop in their incipiency mergers which may substantially lessen competition in any given market. Yet large corporations are relentlessly increasing their share of the nation's economic pie at the expense of small and medium-size businesses. As a result, small business owners feel they have little power in Washington and that their problems go unnoticed in the public forum in favor of the concerns of the nation's largest corporations. In 1980, even before the transfer of antitrust authority to the current officials, small businesses were becoming increasingly restless over what they felt to be too great a tilt in both economic policy and government regulation toward the interests of big business.6/The conduct of antitrust officials of this administration can only deepen their concern.

Marriages between firms are dictated, they say, solely by economic factors. The "buzz-word" here is efficiency. But it is suggested that Judge Learned

Hand's classic decision in the Alcoa case[7] be reviewed with care. Alcoa, a giant among pigmies, was offered the opportunity to demonstrate -- to prove -- that its size was the result of superior "foresight, industry and skill." Such proof was not forthcoming -- wuite palpably, it did not exist. And as we have already indicated, it may well be folly to accept the economic ideal of efficiency as paramont, a value to which all others are subordinate.

Vertical Restrictions

In their recent statements and testimony, the administration's antitrust officials have unilaterally reopened questions of law on vertical restrictions. It is still too early to gauge the impact that such gratuitous statements will have on the courts and on the fortunes of small business.

When Congress repealed the fair trade laws in 1975 it removed a major obstacle to the free play of the market place to set the price of products moving through the marketing chain. Of course, vertical relationships involve more than just price. But it must be remembered that it is the purpose of the antitrust laws as they apply to such relationships to maximize the ability of all independent businessmen, including small businesses who must deal with large suppliers, buyers and competitors, to make their own marketing decisions. As a result, certain rules of law are well-established. Today, the administration's antitrust officials would alter that Congressional and judicial policy through their "new" enforcement program. We question -- indeed, we challenge, their authority to do so.

We urge this Subcommittee to look carefully into this question. We urge the Administration to follow a policy of enforcement which is consistent with the law, not with their own notions of the law, and which ensures that all independent businessmen will be allowed to compete independently.

The Role of The Federal Trade Commission

In recent times it has been seriously suggested by members of this administration that the Bureau of Competition of the FTC be eliminated on budgetary and policy grounds. It is claimed that there is no need for the Bureau of Competition,that it duplicates the antitrust enforcement mission of the Department of Justice and creates more regulation by government. The Small Business Legislative Counsel opposes any attempt to eliminate the system in existence now; for the Federal Trade Commission through its Bureau of Competition occupies a unique and essential role in antitrust enforcement.

The Federal Trade Commission was organized in 1914 to supplement and further our national policy of encouraging competition. This policy is the antithesis of regulation by government and it is the primary and vital mission of the FTC. The FTC was created to be an antitrust expert, and to apply that expertise to the implementation of laws that embody the virtues of our free-enterprise, competitive system.

As a general matter then, the FTC does not and cannot duplicate the antitrust function performed by the Department of Justice. Moreover, the FTC proceeds in two special and quite unique ways. First, it reaches those acts and practices that tend to be destructive of competition and tend toward monopoly, whether engaged in by one firm or by several. The Department of Justice cannot do this, for they must prove the existence of a conspiracy, or alternatively, something close to actual monopoly. It is the FTC, and only the FTC, through the investigative and prosecutorial mission of its Bureau of Competition, that can control most individual conduct that is undesirable as being anti-competitive.

The second unique area of FTC enforcement is that the FTC -- and only the FTC -- can intercept anti-competitive conduct in its incipiency under its authority to curb unfair methods of competition.[8] That is, the FTC can, and does, challenge market behavior that has not yet reached the stage of being a full-blown restraint of trade. By way of this enforcement authority we are all spared the economic distortions as well as the human suffering involved in being compelled to endure the ripening of anti-competitive practices.

Conclusion

In conclusion, let us say that what is at stake here are efforts to eliminate a national treasure -- an economic and political policy that has been the result of decades of labor by Congress, by the courts, and by independent governmental agencies. We think it obvious that the future of small business is inextricably tied to this policy. We will continue to make our voices heard and deeply appreciate this opportunity to do so.

Thank you Mr. Chairman.

FOOTNOTES

1/ Standard Oil of New Jersey v. United States, 221 U.S. a, 83(1911).

2/ Brandeis, *Competition*, 44 *American Legal News* 5 (1913).

3/ Brown Shoe v. United States, 370 U.S. 294, 343 (1962).

4/ Statement of Assistant Attorney General Baxter, *The American Lawyer*, July, 1981.

5/ Statement of Assistant Attorney General Baxter, New York Times, April 26, 1981.

6/ See, *Looking Toward the 80's: A Chemical Bank Survey of Small and Medium Sized Businesses in New York* (November 1979).

7/ United States v. Aluminimum Co. of America, 148 F.2d 416 (2d Cir. 1945).

8/ Section 5 of the Federal Trade Commission Act prohibits unfair methods of competition in interstate commerce.

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The position paper -- The Robinson-Patman Act -- is supported by the following members of the Small Business Legislative Council:

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Hilliard, OH

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New York, NY

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Natl. Tire Dealers & Retreaders Assn.
Washington, DC

Natl. Wine Distrib. Assn.
Chicago, IL

THE ROBINSON-PATMAN ACT

Antitrust law has a single stated goal: preservation of competition. That goal motivated the U.S. Congress to enact the Sherman Antitrust Act in 1890. The Sherman Act, though, could provide penalties only in those instances in which offenses had already taken place. The 63rd Congress strengthened existing antitrust law with passage of the Clayton Act. The basic intent of the Clayton Act was to prevent monopolies from being formed through the use of unfair, anti-competitive trade practices.

The Clayton Act, however, proved to be ineffective against price discrimination, partially by reason of inadequate enforcement and partially due to judicial interpretation. Under the interpretation of the Clayton Act, there was no mechanism to prevent the stifling of competition through the granting of excessively favorable pricing for items purchased by large buyers.

To remedy this, the Congress, in 1936, overwhelmingly approved the Robinson-Patman Act, which has come to be known as the "Magna Carta" of small business. The Robinson-Patman Act forbids price discrimination between purchasers of goods of like quality in interstate commerce, where the effect of such discrimination "may be to substantially lessen competition or tend to create a monopoly in any line of commerce..."

A jurisdictional requirement of the Robinson-Patman Act allows action under the Act only where the price discrimination may lessen competition or tend to create a monopoly. This essential clause clearly points out that the Act, as originally framed, was created to promote competition, and to discourage increased concentration.

The Robinson-Patman Act does not "reward inefficiency," as its critics claim, but does prevent rewarding the largest buyers in the market simply because of their size. Large buyers may claim a purchasing advantage, but this must be based on the cost-justified volume of their purchases.

RESOLVED

To assist the small business, the Robinson-Patman Act was enacted to stop in the incipiency anticompetitive practices which have plagued this country. The Robinson-Patman Act is a cornerstone

-over-

which small business stands behind, and any effort to erode its principles is opposed,since this would lead to a weakening of the segment of our society which has built this country. The "administrative repeal" of the Robinson-Patman Act must be reversed, and funds specifically for Robinson-Patman Act enforcement need to be appropriated. The FTC must be required to show the effects of its enforcement of "The Magna Carta of small business."

# # #

NFIB National Federation of Independent Business

STATEMENT OF

WILLIAM J. DENNIS, JR.

DIRECTOR OF RESEARCH
NATIONAL FEDERATION OF INDEPENDENT BUSINESS

Before: Senate Small Business Committee

Subject: Administration's Anti-Trust Policy

Date: December 1, 1981

Mr. Chairman, NFIB on behalf of its membership, which is in excess of 500,000 small and independent businesses, appreciates this opportunity to present our views on the Administration's anti-trust policy.

NFIB's position on anti-trust matters is established through membership vote just as is our position on other issues. Since anti-trust involves many separate issues, no single vote summarizes our views. Suffice it to say that as a general principle small business is concerned over the increasing concentration of American business. For example, twice in the past two years (4/79 and 9/81),

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NFIB members have supported shifting the burden of proof in a merger or acquisition from the government to the business when the case involves a larger firm. In both instances, the margins were 2-1. Similarly, small business does not favor exemptions to anti-trust laws such as currently exist for motor carrier rate bureaus, certain insurance functions, agricultural co-ops, and labor organizations (9/78).

However, the substantial minorities (sometimes pluralities) opposing specific initiatives considered to be anti-trust in nature, e.g., the vote on Illinois Brick was 33% for, 43% against, and 24% undecided, indicates to us that the immediate and often experienced fear of government and the complexities of the legal system sometimes overshadow the seemingly more remote and less frequently experienced fear of monopolistic competition. The foregoing is not intended to mean that small business does not perceive larger firms as a competitive threat. One small business in twenty consistently reports competition from large businesses as their single most important problem; also, large firm competition ranked eleventh in a list of twenty-five problems recently presented to a sample of urban entrepreneurs. But small businessmen apparently distinguish between normal (though not necessarily favorable) competition and monopolistic competition. Thus, while there is concern over larger firms, the concern over government is sometimes so pervasive that it inhibits their view of government action to stem what they see as another problem.

The Current Condition

Without elaboration, we would like to raise what we consider five relevant and interrelated points. Each we believe bears on today's hearing topic.

1. There is more to anti-concentration policy than enforcement of anti-trust statutes. In other words, there are additional areas of government activity which influence relative competitive positions. Two areas immediately come to mind, regulatory and tax policy, although others exist.

For example, Edison Zayas of the NFIB staff has convincingly demonstrated that the regulated trucking industry is one of the more concentrated industries in the nation despite economies which should make it one of the least. Government regulatory policy, most notably through limited market entry and legalized price fixing, allowed that situation to develop. While these issues have little to do with what one normally considers anti-trust policy, they have an enormous impact on economic concentration.

2. Anti-trust cases are enormously complex and often quite lengthy. All cases do not reach the proportions of the AT&T or Exxon et.al. cases. However, their cost and length make it a practical impossibility for a small business or even a group of small businesses to privately litigate an anti-trust suit against a large competitor. That implies that the government has an important role in policing competition to ensure the rules are being followed.

3. Relatively few anti-trust cases are prosecuted. Between 1964 and 1977, a period spanning Administrations of both parties, the Justice Department was involved in 33 conglomerate cases of which it lost 22. While such numbers do not account for such salutary effects as deterrence, this number in contrast to the total number of actions undertaken by conglomerates is small. The clear implication is that either very few conglomerate activities are anti-competitive or the law is so narrowly drawn that a successful prosecution is almost impossible to achieve. (A third possibility is that resources are not being effectively utilized. In early 1978, NFIB reported that from January, 1972 through 1977, there were 263 price fixing cases filed against firms with less than $5 million in annual sales and only 47 against Fortune 500 companies. While NFIB supports the prosecution of price fixing no matter what sized business is involved, a more rational allocation of resources would seem to mean turning over as many of these small cases as possible to the State Attorneys General.)

4. The argument in favor of mergers and acquisitions is that they are actions resulting in greater economic efficiency which in turn leads to a greater good for the consumer. The corollary is that even if they do not provide economic efficiencies in the near term, government interference in these matters infringes on the right to make what eventually may prove to be an ill-advised economic decision.

While it is true that in numerous cases an acquisition or merger results in greater economic efficiencies being achieved, it is also true that the opposite results in numerous cases. In fact, the empirical evidence is at best mixed. There is no conclusive proof that mergers and acquisitions as a group are either economically helpful or harmful.

If mixed results accrue, why not leave managers to their judgments? Why should anyone reasonably object on behalf of society unless it is clear competition per se that is being affected? Why should not one firm enjoy the rights of other segments of the population? These are very reasonable questions, but they assume no inherently negative consequences of a merger or acquisition involving a larger firm. It is that assumption which must be challenged, for there are inherently negative consequences, the principal one of which is more and more power in fewer and fewer hands.

5. Given the aforementioned conditions, we think it reasonable that the burden of proof in acquisition and merger cases involving the nation's very largest firms should be shifted. In other words, unless the good of an acquisition or merger can be demonstrated, the increased economic power accruing should offer sufficient grounds to deny the proposed action. While defining what constitutes a "good" would be more difficult in practice than in theory, it is an effort worth undertaking.

One could argue that a far more simple approach involves a cut-off beyond which point all mergers and acquisitions would be denied. While having the considerable advantage of avoiding subjective judgments and legal complexities, such an approach assumes that all mergers and acquisitions are not useful. The evidence and common sense don't support such an assumption. Rescuing a failing firm or achieving optimal economies of scale may be very much in the nation's interest, even when they involve very large firms. Big can be good and we should take advantage of it as possible, but it isn't good inherently.

The suggestion of these five points do not draw as detailed distinctions between concentration, competition, anti-trust, etc., as one might like. However, we list them to provide you with an understanding of our philosophic bent rather than an argument for one policy or another. They further place our subsequent comments in context.

Administrative Policy

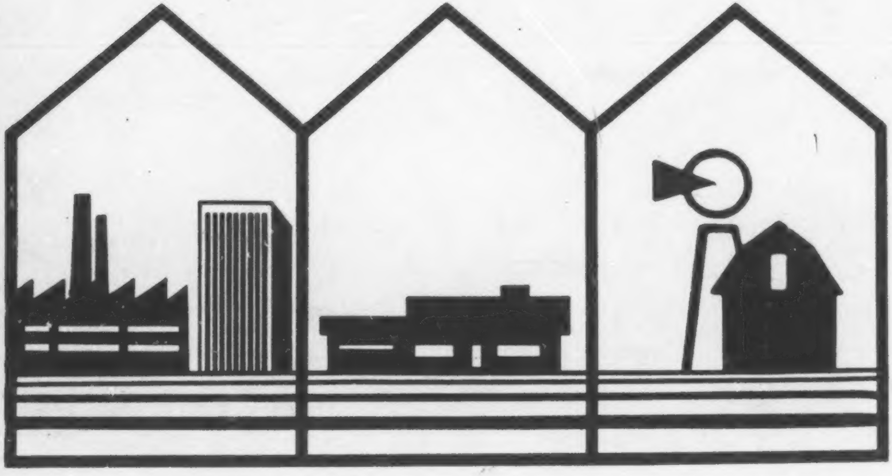
Commenting on Administration anti-trust policy is difficult when we are not clear what that policy is. While it appears that the policy is laissez faire, we do not have the resources to judge the merits of each case in the recent merger wave, and we noted that the Heilemann purchase of Schlitz was challenged. But whatever the policy is, it leaves the clear impression that it is no policy, and that gives us cause for enormous concern.

As noted earlier, NFIB believes the law needs to be changed. Given the record of Administrations seemingly more inclined to pursue anti-trust matters, it is questionnable how successful an Administration could be no matter how committed. But if an Administration is publically committed, there is at least some salutary effect flowing through deterrence. The public posture of this Administration would seem to provide virtually none. That threat of challenge, or deterrence, if you will, may be the single most adverse consequence of Administration policy.

In other areas affecting competition, the picture is more mixed. Vice President Bush's regulatory group has made concerted efforts to identify regulations particulary onerous to small firms, and similar efforts in other places have been helpful. On the other hand, Administration appointees to the ICC have virtually reversed the course of trucking deregulation to the detriment of small firms.

The Administration offered the better of the two tax packages recently considered. However, it has vigorously resisted change in such important areas as inventories and payroll taxes.

With notable exceptions the Administration has yet to clearly demonstrate that it recognizes any distinction between large and small firms. To the extent that view has allowed the Administration to focus on redirecting the economy toward sustained, non-inflationary growth, no problem has been created. The principal problems of small business in the near term are similar to those of larger firms -- inflation, interest rates, sluggish sales, and uncertainty. But to the extent that it shapes the long term competitive balance including the rules of the marketplace, it is unquestionably disturbing.



Statement of the
NATIONAL ASSOCIATION OF REALTORS®
THE WORLD'S LARGEST TRADE ASSOCIATION

TO THE: Subcommittee on Productivity and Competition of the Senate Committee on Small Business

ON: Federal Antitrust Policy and Small Business

BY: William D. North

DATE: December 1, 1981

STATEMENT ON BEHALF OF THE NATIONAL ASSOCIATION OF REALTORS® REGARDING FEDERAL ANTITRUST POLICY AND SMALL BUSINESS ON DECEMBER 1, 1981

I am William D. North, Senior Vice President and General Counsel of the NATIONAL ASSOCIATION OF REALTORS®.

On behalf of the nearly 700,000 members of the National Association, I am deeply grateful to the Subcommittee for the opportunity to express our concerns with certain apparent trends in the financial community and the antitrust and anti-competitive implications of those trends.

At the outset let me establish that the concern of the National Association for the interests of small business is very real and very legitimate. Forty-eight percent (48%) of the real estate firms affiliated with the NATIONAL ASSOCIATION OF REALTORS® have five or fewer sales associates. The median size real estate firm which is associated with the National Association has 6.3 sales associates while the average size real estate firm has only 13.3 sales associates. Only 1.3% of the 100,000 firms holding membership through their brokers in the National Association have 100 or more sales associates. 1/

However measured the constituents of the National Association are small business men and women. The real estate business has long offered great opportunity to those who have sought to "be their own boss." No other has fewer barriers to entry. Capital requirements are minimal and barriers of sex, race, and age are non-existent.

1/ NATIONAL ASSOCIATION OF REALTORS®, Real Estate Firm Survey, October, 1981

Historically the only limits on the opportunity for small business men and women in real estate was their individual energy, ability, initiative and enterprise.

This industry of opportunity is, however, an endangered species of small business today. And the danger stems not from the cycles to which the housing market has long been subject, nor from the vagaries of interest rate escalation or disintermediation which have been survived and accommodated repeatedly in times past.

Rather, the real estate business and a number of other related home service businesses are endangered by the accelerating concentration of financial institutions and the entry of those institutions into the business of providing brokerage and other services required by home buyers and sellers.

That the concentration of financial institutions is accelerating at an unprecedented pace is indisputable. For the fiscal year ending September 30, 1981 alone, the Antitrust Division evaluated the competitive impact of more than 900 bank and bank holding company mergers.[2/] This level of aggregation and concentration proceeded in spite of prohibitions against interstate banking by full service banking organizations, the prohibition of interstate branching of savings and loan associations under Federal Home Loan Bank Board regulations, and the general refusal of the Federal Reserve Board to authorize bank holding companies to acquire thrift institutions such as savings and loan associations.

2/ Remarks by Stanley M. Gorinson, Chief, Special Regulated Industries Section of the Antitrust Division of the U.S. Department of Justice before the Fall Meeting of the Association of Bank Holding Companies, Nov. 12, 1981.

If 900 mergers of financial institutions are initiated in spite of such obstacles, the removal of such obstacles can only produce an irresistible torrent of mergers, consolidations, and acquisitions. The degree of concentration which will result is best suggested by the recent merger of the West Side Savings and Loan of New York City and the Washington Savings and Loan of Miami Beach, Florida, into the Citizens Savings and Loan of San Francisco to produce a new form having 136 branches in three states and assets of 6.8 billion dollars.[3]

It is, of course, readily possible to understand and accept mergers designed to salvage failing thrift institutions. But this is not the condition precedent to the mergers which this administration appears inclined to encourage, or at least allow. On the contrary, if the remarks of Stanley M. Gorinson, Chief of the Special Regulated Industries Section of the Antitrust Division of the Department of Justice to the Association of Banking Holding Companies in November of this year properly reflects administration policy, the long-established geographic and product limitations imposed on the banking and thrift industries are now deemed obsolete and should be relaxed or removed.[4]

We suggest, however, that the concerns to which such limitations respond and have responded effectively for many, many years remain of paramount importance to small business and particularly those segments of small business such as real estate which are highly credit sensitive. The limitations on the extent and types of expansion of financial institutions were established to protect the access of the small borrower, be that borrower an individual or a business, to the financing needed for survival. They were designed to make unnecessary the costly and often exploitive pilgrimages to the great money markets of Wall Street and La Salle Street; they were intended to make it possible to obtain financing without competing, head to head, with the Mobile, Exxons, Sears, and other giant consumers of credit.

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[3] "S & Ls in 3 States to Merge, Forming Largest in U.S.," Chicago Tribune, Sept. 9, 1981.

[4] *See* note 2, *supra*.

We realize the need for our financial institutions to be healthy and are deeply concerned with preserving their ability to compete. But to be concerned solely with the competition between banks or banks and money market funds or quasi-banks such as Merrill Lynch, Sears and other conglomerates are developing is to define competition in terms which would preserve one level of competition at the expense of all others.

Small business is neither served nor protected by an oligopoly of financial institutions. Nor are the people of this country served or protected by such concentration.

In a capitalistic economy such as ours, the very name of the game of business survival is access to capital. The right to grant or refuse a loan is the right to create or kill an enterprise, particularly a small business which has no effective access to the risk capital markets.

Likewise, business survival depends not merely on the access to financing, but also on the terms of such financing. Here again the small business men and women of the real estate business are concerned, not just with the concentration of the many sources of financing into a few, but even more importantly with the expansion of those few into real estate brokerage, insurance, and other activities.

The coupling of brokerage or insurance services or products with the financing function creates a perniciously anti-competitive situation. Given the traditional and heretofore unchallenged right of financing institutions to discriminate, subject to state and federal civil rights laws, between credit applicants in the terms of financing offered, and given the traditional and unquestioned practice of giving preference to those applicants who are depositors or have established relationships, there is good reason to expect that financial institutions providing other non-financial services and products will package access to financing with the other services and products they offer.[5/]

It is not an idle or unrealistic scenario to anticipate that if such expansion of the product line of financial institutions is permitted, the availability of credit will not depend on the credit worthiness of the applicant, but rather will depend on whether the applicant:

a. is a customer of the financial institution's real estate brokerage office;

b. has his retirement plan and investment account with the financial institution's stock brokerage subsidiary;

c. purchases his title, mortgage, public liability, and casualty insurance from the financial institution's agent or company;

[5/] "Reputation to Aid Sears, Analysts Say," Houston Post, Sept. 7, 1981

d. has entered into a home purchase agreement for transferring employees with the financial institution's Third Party Home Buying Affiliate; or

e. has agreed to purchase the financial institution's line of home appliances or home furnishings.

If there is any question that this packaging of financing with other services and products is more than a paranoid pipe dream of real estate brokers under pressure we urge you to review carefully the testimony of the Acting Director of the Office of Policy Planning of the Federal Trade Commission to the House Subcommittee on Housing and Community Development of the House Committee on Banking, Finance, and Urban Affairs on September 15 of this year. [6/] That testimony not only identifies the packaging of home financing with other settlement services and home products as a market probability, but also and most significantly advocates such packaging on a broad scale as entirely consistent with the goals of the antitrust laws.

We submit that if financial institutions are permitted to merge into fewer and fewer entities larger and larger in size and if those institutions are permitted to package credit and financing with purchases of goods and services they offer, small business has no future in this economy.

If the price of securing the financing to buy a home is the use of the stock broker, attorney, title insurance, appliances, rugs, or other services, product or agent designated by the financial

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[6/] Statement of Thomas H. Stanton, Acting Director, Office of Policy Planning, Federal Trade Commission, before the Subcommittee on Housing and Community Development of the House Committee on Banking, Finance and Urban Affairs, Sept. 15, 1981.

institution, that price will be paid because the need for housing allows no alternative. Nor is it any justification to contend, as Dr. Stanton of the Federal Trade Commission appears to do that packaging will produce price reductions. Price reductions have never been a long-term characteristic of either monopoly or oligopoly and the willingness of an organization to cross subsidize rarely, if ever, extends beyond the time it takes to eliminate competition.

The financial institutions which have been seriously pressed by the interest rate imbalance of the last 18 months are looking to the Congress for deliverance. The National Association has supported a broad range of initiatives designed to protect their health and future and is prepared to support additional safeguards.

But the deliverance of financial institutions from financial jeopardy should not deliver small business and the American consumer into the hands of interstate financial conglomerates.

We urge this Subcommittee and through it the Congress to provide legislative guarantees to assure that the availability of credit cannot be tied to or conditioned directly or indirectly on the purchase or use of goods and services offered by the financial institution or its affiliates and subsidiaries.

We urge this Subcommittee to limit the concentration of financial power which is now in progress to assure that housing needs do not become a source of banker leverage over the financial and product choices and alternatives of American consumers.

Finally we urge this Subcommittee to assure that our limited supply of credit is made to serve all the people and all the people and all the businesses serving those people and not merely the insatiable demands of the corporate giants.

The availability of credit is this century's "cross of gold." This Congress in its response to the concentration and expansion of financial institutions may well determine if small business will be crucified on it.

The NATIONAL ASSOCIATION OF REALTORS® is comprised of more than 1,806 local boards of REALTORS® located in every state of the Union, the District of Columbia, and Puerto Rico. Combined membership of these boards is nearly 700,000 persons actively engaged in sales, brokerage, management, counselling, and appraisal of residential, commercial, industrial, recreational and farm real estate. The activities of the Association's membership involve all aspects of the real estate industry, such as mortgage banking, home building, and commercial and residential real estate development, including development, construction and sales of condominiums. The Association has the largest membership of any association in the United States concerned with all facets of the real estate industry.

Elected Officers are: President John R. Wood, Naples, Florida; President-elect Julio S. Laguarta, Houston, Texas; Treasurer Budd Krones, Tucson, Arizona.

The Chief Administrative Officer is Jack Carlson, Executive Vice President and Chief Economist.

The Senior Vice President, Government Affairs is Albert E. Abrahams and the Vice President and Legislative Counsel, Government Affairs is Gil Thurm.

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Senator GORTON. With that, the meeting is adjourned.

[Whereupon, at 12:37 p.m, the committee recessed, to reconvene at the call of the Chair.]

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